No. _____

October Term, 2018

In the
Supreme Court of the United States

Frank LaPena,

Petitioner,

v.

George Grigas, et al.

Respondents.

Motion for Leave to Proceed *In Forma Pauperis*

Rene Valladares
Federal Public Defender,
District of Nevada
*JONATHAN M. KIRSHBAUM
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*Counsel for LaPena

Petitioner Frank LaPena respectfully asks for leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. LaPena has been granted leave to so proceed in the District Court and in the United States Court of Appeals. Counsel was appointed by the United States District Court for the District of Nevada under 18 U.S.C. § 3599(a)(2). *See also* SUPREME COURT RULE 39.1 (authorizing leave to proceed in forma pauperis). Accordingly, no affidavit is attached.

Dated October 24, 2018.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/Jonathan M. Kirshbaum
Jonathan M. Kirshbaum
Assistant Federal Public Defender

No. _____

October Term, 2018

In the
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Frank LaPena,

Petitioner,

v.

George Grigas, et al.

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari
[CORRECTED COPY]

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QUESTION PRESENTED

The year was 1974. The town—Las Vegas. Organized crime dominated the Strip. Gangsters and their associates controlled the casinos. Mafia syndicates had found a river of money flowing through the parched desert valley, and they protected it at all costs.

This setting has produced many wild stories, but none as incredible as Frank LaPena's. His odyssey began when the State accused him of an unlikely crime, one that seems ripped from the pages of a pulp novel. Frank was a handsome young bell captain at the Hacienda. He was dating Rosalie Maxwell, a beautiful cocktail waitress at Caesars. Rosalie was two-timing Frank with Marvin Krause, a middle-aged slot manager (also at Caesars). Marvin showered Rosalie with cash and gifts, but Marvin's wife Hilda controlled the Krause fortune.

According to the State, Frank and Rosalie wanted Hilda's money, and they hatched a convoluted plot to get it. They hired their pal Jerry Weakland to kill Hilda. With Hilda gone, Rosalie would swoop in and marry Marvin. Then something untoward might happen to Marvin. By the end of this scheme, the money would have passed from Hilda to Marvin and then to Rosalie—with Frank, her true love, waiting in the wings to share it.

At least, that's the story Weakland told, after the State offered him a sweetheart deal and after he confessed to murdering Hilda. Only one problem—which is the issue in this petition: Weakland didn't kill Hilda. He's always said he slit her throat with a single cut, no more, but that's not how she died. Instead, someone strangled her, then slit her throat, then stabbed her, repeatedly and violently, in the neck—a crime of passion, not a clinical contract killing. Weakland's testimony about the murder doesn't begin to match up with the physical evidence. Because no rational juror could conclude Weakland killed Hilda, Frank cannot be guilty of a contract killing.

Four decades later, we may never know who killed Hilda. But one thing is certain—Frank had nothing to do with it. The issue presented in this petition is the following:

> Whether the Nevada Supreme Court's decision rejecting the legal insufficiency claim was unreasonable because, even under a highly deferential review, no rational juror could have concluded Weakland killed Hilda when his description of the manner of death was inconsistent in every way with the physical evidence?

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

TABLE OF CONTENTS

Question Presented i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Statement of the Case 2

1. Hilda's Murder 2

2. Nearly One-to One Discrepancy Between Weakland's Testimony About the Murder and the Physical Evidence 5

Reasons for Granting the Petition 7

II. The Nevada Supreme Court's decision rejecting the legal insufficiency claim was unreasonable because, even under a highly deferential review, no rational juror could have concluded Weakland killed Hilda when his description of the manner of death was inconsistent in every way with the physical evidence 7

Conclusion 12

Certificate of Service 13

Index of appendix 14

TABLE OF AUTHORITIES

Federal Cases

Cavazos v. Smith, 565 U.S. 1 (2011) 7, 11

Jackson v. Virginia, 443 U.S. 301 (1979) 7

Souter v. Jones, 395 F.3d 577 (6th Cir. 2005) 8

Federal Statutes

18 U.S.C. § 3599 2

28 U.S.C. § 1254..... 2

28 U.S.C. § 2254 1

28 U.S.C. § 2254(d) 7, 11

In The

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October Term, 2018

Frank LaPena,
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United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Frank LaPena respectfully prays that a writ of certiorari issue to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit. *See* Appendix B.

OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Ninth Circuit affirming the denial of LaPena's petition for a writ of habeas corpus, issued on June 5, 2018, is unpublished. *See* Appendix B.

JURISDICTION

The United States District Court for the District of Nevada had original jurisdiction over this case, pursuant to 28 U.S.C. § 2254. The district court denied a Certificate of Appealability. *See* Appendix D. The Ninth Circuit affirmed the district court's decision and, on July 16, 2018, denied LaPena's petition for rehearing. *See*

Appendix A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. See also Sup. Ct. R. 13(1).

STATEMENT OF THE CASE

1. Hilda's Murder

Just after dawn on January 14, 1974, at least two assailants broke into the home of Hilda and Marvin Krause, and somebody killed Hilda. We may never know what really happened, but the following series of events seems likely.

At least two perpetrators, Gerald ("Jerry") Weakland and Tom Boutwell, entered the Krause home that morning. Weakland was a former boxer who worked as a pool boy at Caesars Palace. Boutwell was a former football player who was visiting Las Vegas and staying with his old teammate, Robert ("Bobby") Webb. Weakland and Webb were friends.

On January 12, 1974, Boutwell and Webb ran into Weakland at Caesars. Weakland said he had a job for Webb. Early on Monday, January 14, Weakland came to Webb's house to pick him up for the job. Webb proposed that Boutwell go instead. Weakland told Boutwell the plan was to rob a man who car-ried alot of cash on him. Boutwell agreed to help out.

Boutwell didn't know it at the time, but Weakland's target was Marvin Krause, a slot manager at Caesars. Hilda herself was a part owner of Caesar's. Marvin left for work early on Mondays and Fridays to attend the slot "drop," when Caesars employees collected coins from the machines. That's when Weakland wanted to hit Marvin.

Weakland and Boutwell left Webb's apartment at about 5:00 a.m. The pair drove to a parking lot outside the Las Vegas Country Club (a gated residential community surrounding a golf course). They scaled a wall surrounding the community and found themselves near the Krause residence.

As they waited for Marvin to leave, a taxi cab pulled up to the house. An unknown woman got out of the cab and rang the doorbell. Someone answered the door. A couple minutes later, the woman got back in the cab, and the cab drove away.

Soon after, Marvin opened his garage door. Weakland and Boutwell ran in. They grabbed Marvin, dragged him inside, and marched him upstairs. Hilda came out of her bedroom (the southeast bedroom), and the assailants ordered both Krauses in-to that bedroom. Weakland pistol-whipped Marvin in the head and brought Hilda into the other bedroom (the north bedroom). Boutwell rummaged around for valuables but didn't find much. Weakland took a watch and a ring from Marvin. The pair also took a television. They left the scene in Marvin's car and noticed another car parked nearby with its lights on. They switched cars, and headed to Webb's apartment.

At some point that morning, someone killed Hilda in the north bedroom. Weakland testified at Frank's second trial that he committed the murder himself. As will be shown below, his testimony about how he allegedly committed the murder does not match up with the physical evidence.

Later on, Marvin told the cops he was having an affair with Rosalie Maxwell, a cocktail waitress at Caesars. The cops interrogated Rosalie. She admitted to

sleeping with Marvin but said her true love was a man named Frank LaPena. This love triangle intrigued the police.

After hearing about Hilda's death, a confidential informant named Joey Costanza called Detective Mike Whitney. Costanza told Whitney that someone had approached him in early December about a job that sounded like the Krause crime. Costanza later clarified that the person who approached him was Jerry Weakland.

The police arrested Weakland on March 13, 1974. The State charged him with murder. His lawyer, Michael Cherry (the current Chief Justice of the Nevada Supreme Court), negotiated the deal of a lifetime: Weakland would plead to second-degree murder, and instead of facing the death penalty, he would be eligible for parole in five years.

As part of the deal, Weakland agreed to name his co-conspirators. He told the following story to the police. He said Frank and Rosalie had hired him to kill Hilda. The key meeting took place in early January 1974. At this meeting, Frank and Rosalie paid Weakland $1,000 and promised another $10,000 later.

According to Weakland, Frank and Rosalie had an unlikely motive for wanting Hilda dead. Rosalie was dating Marvin. Marvin would give her gifts and money, but Hilda was standing in the way. Frank and Rosalie wanted Hilda gone so that Rosalie could get together with Marvin, who would start sharing more money with Rosalie.

2. Nearly One-to One Discrepancy Between Weakland's Testimony About the Murder and the Physical Evidence

Frank was charged with committing a "contract killing." An essential element of the crime, as set forth in the jury instructions, was that "one or more of the parties to the agreement commits murder."

Weakland explained at Frank's trial how he supposedly committed the murder. He testified that, after he struck Hilda in the back of her head and knocked her unconscious, he killed her by slitting her throat with a single cut. He explained he straddled her from behind, over her back, with one leg on each side of her body, then lifted her head up and sliced her neck from left to right. He then drove the knife into her back in an attempt to puncture her lung. He claimed to have stuck the knife so forcefully in her back that he snapped off the handle. He denied stabbing Hilda's neck or strangling her.

That account does not match up at all with the physical evidence. According to the State's coroner, someone first attempted to strangle Hilda. Next, the murderer slit Hilda's throat. The cut was deep on the right side and shallower on the left. According to the coroner, the neck wound "extend[ed] roughly horizontally **from right to left** across the neck."

Then, the assailant stabbed Hilda through the neck wound, at least once but probably multiple times, "with great force" and with real depth. There were fractures in parts of her vertebrae from the force of the stabbings. There was a partial severance of the cartoid artery and full severance of the vertebral artery deep in the neck. The coroner believed Hilda died as a result of a "massive external hemorrhage"

from the lacerations of the arteries.

A knife was found stuck in Hilda's back. This wound was "superficial," only two centimeters long and one centimeter deep, and did not cause "significant damage." The coroner indicated in his report there was no injury to Hilda's head.

The jury convicted Frank of first-degree murder. He was sentenced to life without parole. Appendix G. On direct appeal Frank raised a legal insufficiency claim, arguing, in part, Weakland's testimony about the murder was inconsistent with the physical evidence. The Nevada Supreme Court rejected the legal insufficiency claim, but did not address the argument concerning this glaring inconsistency. Appendix F.

REASONS FOR GRANTING THE PETITION

II. The Nevada Supreme Court's decision rejecting the legal insufficiency claim was unreasonable because, even under a highly deferential review, no rational juror could have concluded Weakland killed Hilda when his description of the manner of death was inconsistent in every way with the physical evidence

A conviction is unconstitutional if it is not supported by legally sufficient evidence. *Jackson v. Virginia*, 443 U.S. 301, 319 (1979). Evidence is legally sufficient if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have bound the essential elements of the crime beyond a reasonable doubt." *Id.* On habeas review, there is an added layer of deference under 28 U.S.C. § 2254(d). A state-court decision rejecting a sufficiency challenge may only be overturned on federal habeas review if the state decision was "objectively unreasonable." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011).

This is one of the rare situations where a habeas petitioner can overcome the highly-deferential legal insufficiency standard. No rational juror juror could conclude that Weakland actually committed the murder. It is simple. His account does not match up at all with the physical evidence. It boils down to one question: either believe the science or believe Weakland's story. Given this choice, there is only one rational conclusion: the science provides the truth of what happened and Weakland had no idea how Hilda was actually murdered.

Weakland's story of the murder is nothing like the coroner's account. Weakland denied strangling Hilda or stabbing her in the neck; according to him, he only slit her throat. But it was the stabbing through the neck wound that caused the

most damage. There is only one rational way to explain this discrepancy: Weakland did not have first-hand knowledge of how Hilda died. Rather, his account was based on what he read in the newspaper, what was fed to him by the police, or what was visible in the crime scene photos.

That is not the only problem with Weakland's story. For one, Weakland testified he did not get any blood on him, and he wasn't sure Hilda bled. His accomplice, Tom Boutwell, confirmed Weakland didn't get any blood on him. But based on the coroner's description of Hilda's injuries, she would have bled profusely. The severance of the artery would have sprayed blood. There was blood all over the north bedroom. There was also blood all over Hilda's right sleeve, consistent with the artery spraying blood. The actual killer would have gotten blood all over himself. But Weakland was not bloody, which makes it highly unlikely he killed her. *See Souter v. Jones*, 395 F.3d 577, 596 (6th Cir. 2005).

While Weakland said he slit Hilda's throat, and while her throat was indeed slit, even this part of Weakland's testimony does not match up with the physical evidence. Weakland claimed he straddled Hilda from behind, lifted up her head, and cut her throat from left to right. However, the coroner testified the opposite was true. He testified the "neck wound extend[ed] roughly horizontally ***from right to left*** across the neck." The physical evidence showed why the coroner would say this. The cut was much deeper on the right side than on the left. Logically, the cut would be deeper on the side of the initial incision. Extra force would be necessary for the initial perforation of the skin. If the killer inflicted the cut from left to right (as Weakland

testified), it would be physically difficult to make the cut deeper on the right side than on the left. Similarly, the shallowness of the cut on the left is more consistent with it being the terminus of the cut, rather than the location where the cut began.

Put simply, Hilda's throat was not cut in the manner Weakland described. It was cut in the opposite direction. This indicates the killer was most likely left-handed or was standing in a different position than the one described by Weakland. At the very least, it showed that Weakland did not know how Hilda's throat was actually cut.

The problems continue with the murder weapon. The police recovered a straight-edged butcher knife at the crime scene. But Weakland said he killed Hilda with a serrated bread knife. That cannot be; the coroner himself said the weapon had to have been a "sharp-pointed instrument."

Similarly, the knife and its handle broke during the attack. Weakland said that happened when he stabbed Hilda's back in an attempt to puncture her lung. But the back wound was superficial, only one centimeter deep. It is impossible for this shallow impact to break the knife. It is much more likely the knife broke as the murderer stabbed Hilda in her neck "with great force," which resulted in fractures to two of her vertebrae. Weakland is wrong on yet another count.

Indeed, an exchange between Weakland and defense counsel on this point is enlightening:

> Q You actually dropped down on her back with your legs on each side of her?

A I was standing straddled over her back, one foot on one side, one foot on the other.

Q Then you reached down and pulled her head up?

A I am sure I raised her head up, yes.

Q With one cut you cut her throat?

A Yes.

Q Were you convinced at that point that she was dying or dead?

A I suppose that's why I stuck the knife in her back, plunged it in there, figured, you know, try to go in through her lung.

The emphasized language is obviously untrue. The knife was not "plunged" into her back. There was no damage anywhere close to her lung. His use of the word "suppose" showed Weakland was just making it up as he went along. And we can be sure of this because nothing he said matched up with the actual evidence.

There are even more discrepancies. For example, Weakland testified Hilda remained tied up. Marvin did not say he untied her. But someone must have, because she was found untied. Her sleeve was also covered with blood spray, which was consistent with her having her arm raised by her neck at the time of the stabbing. This means her hands were untied at the time of the killing. Weakland also testified he struck Hilda so hard in the back of the head he knocked her unconscious. But the coroner's report indicated there was no injury to Hilda's head.

Nothing that Weakland said about the murder was backed up by the physical evidence. To be sure, "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." *Cavazos v.*

Smith, 565 U.S. 1, 2 (2011). But there were no competing inferences here. The science only pointed to one rational conclusion—Weakland did not know how Hilda was murdered. There was no blood on him. He could not be the killer.

This is a bedeviling case. On the surface, it seems preposterous to suggest someone who was present at the crime scene and admitted to the murder was not actually the murderer. But something does not add up. It never has. There is a reason why this case has had so many twists and turns over its 40-year history. There is a black hole at the center of it. It is not just that Weakland is (as the Respondents have described) the "iconic incredible witness." ***It is that he falsely confessed to a murder he did not commit.*** It is maddening—we can never know why he did that or who the real killer is. But the upshot of this black hole is this: Frank's conviction cannot be sustained.

In sum, the physical evidence can't be lying. Weakland can't be the killer. Even under the highly deferential standard of Section 2254(d), no rational juror could conclude he committed the murder. The evidence was legally insufficient to establish this element of first-degree murder.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated October 24, 2018.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I certify that on the October 24, 2018, I delivered the original and ten copies of the Petition for Writ of Certiorari and Motion to Proceed *In Forma Pauperis* in the above-entitled case to a third-party commercial carrier for delivery to the Clerk within three calendar days, in compliance with Rule 29.2.

I further certify that all parties required to be served have been served on this October 24, 2018, in accordance with Rule 29.4(a), one copy of the foregoing Petition for Writ of Certiorari and Motion to Proceed *In Forma Pauperis* by delivering said copy to a third-party commercial carrier for delivery, as addressed below.

I also further certify that in accordance with Rule 29.3, an electronic version of the foregoing was also served.

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INDEX OF APPENDIX

Page No.

A. ORDER; Ninth Circuit Court of Appeals 001
Filed July 16, 2018

B. MEMORANDUM; Ninth Circuit Court of Appeals 002
Filed June 5, 2018

C. APPELLANT'S SUPPLEMENTAL OPENING BRIEF; Ninth Circuit Court of Appeals 008
Filed November 9, 2017

D. ORDER; United States District Court 094
Filed May 11, 2015

E. PETITION FOR WRIT OF HABEAS CORPUS; United States District Court 111
Filed September 19, 2000

F. ORDER DISMISSING APPEAL, Nevada Supreme Court 264
Filed June 27, 1991

G. JUDGMENT OF CONVICTION, Eighth Judicial District Court 268
Filed July 13, 1989

APP. 001

FILED

JUL 16 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK RALPH LAPENA, Petitioner-Appellant, v. GEORGE GRIGAS and ADAM PAUL LAXALT, Respondents-Appellees.	No. 15-16154 D.C. No. 2:00-cv-00960-RFB-NJK District of Nevada, Las Vegas ORDER

Before: WALLACE, N.R. SMITH, and FRIEDLAND, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge N.R. Smith and Judge Friedland have voted to deny the petition for rehearing en banc, and Judge Wallace has so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APP. 002

FILED

JUN 05 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK RALPH LAPENA, Petitioner-Appellant, v. GEORGE GRIGAS; ADAM PAUL LAXALT, Respondents-Appellees.	No. 15-16154 D.C. No. 2:00-cv-00960-RFB-NJK MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Richard F. Boulware II, District Judge, Presiding

Argued and Submitted May 16, 2018
San Francisco, California

Before: WALLACE, N.R. SMITH, and FRIEDLAND, Circuit Judges.

Frank LaPena appeals from the district court's denial of his petition for a writ of habeas corpus. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.[1]

---

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[1] We grant LaPena's Motion to Expand the Record on Appeal.

1. There was sufficient evidence to convict LaPena. "[A]fter viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Although Weakland was significantly impeached, he testified that LaPena hired him to kill Hilda Krause, and aspects of Weakland's testimony were corroborated by other witnesses: (1) one of LaPena's cellmates in prison testified that LaPena admitted he had hired Weakland to murder Hilda; (2) Weakland's former wife corroborated various aspects of the crime, including the fact that the jewelry stolen from the Krause residence appeared on her dresser the morning after Hilda was murdered; and (3) Weakland's accomplice in the robbery corroborated the planning, break in, and robbery of the Krause residence. Further, evidence regarding the manner of Hilda's death was not inconsistent with Weakland's testimony.

2. Assuming a freestanding innocence claim is viable, LaPena has failed to meet the burden to "affirmatively prove that he is probably innocent." *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014) (quotation marks and citation omitted). There is no "affirmative[]" evidence that LaPena is innocent. *Id.* The physical DNA evidence does not disprove that Weakland did what he said he did, nor that LaPena hired him to do it. Lastly, the jury had been presented with

extensive impeachment evidence regarding Weakland before it convicted LaPena. LaPena has failed to meet his burden to prove he is actually innocent.

3. LaPena has failed to prove he received ineffective assistance of counsel (IAC).[2] "To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). When both AEDPA review and *Strickland* review apply, both "highly deferential" standards apply "doubly so." *Id.* at 105 (quotation marks and citation omitted).

First, LaPena's trial counsel did not render IAC in his impeachment of Weakland. Under the § 2254(d) standard, even if trial counsel could have further impeached Weakland, we cannot say that LaPena's trial counsel rendered deficient representation by not further impeaching Weakland regarding *why* he un-recanted his testimony. *Harrington*, 562 U.S. at 105 (holding the standard is "whether there is *any reasonable argument* that counsel satisfied *Strickland*'s deferential standard" (emphasis added)). Weakland was significantly impeached, including with evidence that Weakland (1) had received a deal from the state to testify

[2] LaPena only raises four claims of IAC in his briefing before this court. Therefore, any other claims are waived. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

against LaPena, (2) had changed his story multiple times, (3) had been convicted of perjury, and (4) was considered a "psychopathic liar" by a psychologist. *State v. LaPena*, 968 P.2d 750, 755 (Nev. 1998).

Second, it was not unreasonable for the state court to conclude that LaPena did not receive IAC by his counsel's failure to procure the testimony of Costanza. All the evidence that Costanza would have presented was already before the jury through other witnesses, Constanza told the prosecution that "he had told the police all he knew years ago," and LaPena never obtained an affidavit from Costanza regarding *what* additional evidence Costanza could provide. *Id.* at 758-59.

Third, it was not unreasonable for the state court to conclude that LaPena did not receive IAC through his trial counsel's alleged failure to have LaPena testify in his own defense. The Nevada Supreme Court held that "LaPena made an informed, strategic choice not to testify in the second trial." *Id.* at 756. Notably, LaPena conceded at the state evidentiary hearing that he was aware he could testify and that his "testimony went poorly at his first trial." *Id.* LaPena also admitted that he discussed testifying with counsel, and his counsel maintained that he wished to "avoid the 'expected rigorous and thorough cross-examination,'" which could likely include testimony about another criminal prosecution. *Id.*

Finally, LaPena failed to adequately raise his argument that his trial counsel provided IAC by failing to explore and develop a connection between Weakland and Marvin Krause. LaPena raises this issue in his informal brief, but fails to muster any argument or factual basis for it. Therefore, the issue is abandoned. *Crime Justice & Am., Inc. v. Honea*, 876 F.3d 966, 978 (9th Cir. 2017) ("Issues raised in a brief which are not supported by argument are deemed abandoned." (citation omitted)).

4. LaPena fails to raise a constitutional violation in his allegation that the prosecution violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing various exculpatory evidence during the grand jury proceedings. There is no federal right to have exculpatory evidence presented before a grand jury, *United States v. Williams*, 504 U.S. 36, 55 (1992); therefore, such a claim cannot be grounds for a petition for habeas corpus.

5. LaPena failed to exhaust his confrontation claim and, even if we address the merits, he has failed to demonstrate prejudice. "A petitioner has not satisfied the exhaustion requirement unless he has fairly presented his claim to the highest state court." *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (per curiam). LaPena's argument to the Nevada Supreme Court did not "fairly present[] his claim." *Id.* LaPena's opening brief at best only vaguely refers to a federal

constitutional question; his reply brief only cites a state case (which cited a federal case, regarding *bias*, not *propensity*). *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) ("[G]eneral appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion."). Even if we reach the merits of the question, LaPena was not prejudiced by the district court's decision to limit Weakland's cross examination. As noted *supra*, Weakland was significantly impeached, and further cross-examination regarding whether Weakland had a propensity to murder for pleasure does not change what Weakland testified to and others corroborated.

AFFIRMED.

APP. 008

Appeal No. 15-16154

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

***

FRANK RALPH LAPENA, Petitioner-Appellant, vs. GEORGE GRIGAS; ADAM PAUL LAXALT, Respondents-Appellees.	D.C. No. 2:00-cv-00960-RFB-NJK (District of Nevada, Las Vegas)

Appeal from the United States District Court
for the District of Nevada

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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TABLE OF CONTENTS

STATEMENT OF JURISDICTION 1

INTRODUCTION 2

CERTIFIED ISSUES PRESENTED FOR REVIEW 5

BAIL STATUS OF APPELLANT 5

STATEMENT OF THE CASE 6

A. Someone Kills Hilda; an Informant Points the Police to Weakland; Weakland Gets a Deal and Fingers Frank. 6

B. The State Charges Frank and Rosalie; Weakland Recants; the Juries Acquit Rosalie and Convict Frank. 10

C. After a Reversal, the State Cuts a New Deal with Weakland, Discloses the Informant's Name, and Tries Frank Again. 14

1. The State writes poison pen letters to the parole board, and Weakland agrees to cooperate if the State stops. 14

2. The Nevada Supreme Court forces the State to disclose the informant's name; the defense fails to secure his testimony 15

a. The defense learns Costanza's name. 15

b. The defense fails to secure Costanza's testimony. 17

3. Frank refuses a deal for his freedom. 22

4. The case goes to trial again, the jury convicts Frank, and the Nevada Supreme Court affirms. 22

D. Frank Repeatedly Tries to Clear His Name in State Court. 23

1. Frank wins his first post-conviction petition, but the Nevada Supreme Court takes his freedom back. 23

2. The pardons board commutes Frank's sentence. 24

3. Frank is currently litigating a DNA petition in state court. 25

E. Frank Challenges His Convictions In Federal Court. 26

SUMMARY OF ARGUMENT 27

ARGUMENT 29

I. STANDARD OF REVIEW 29

II. FRANK DID NOT HIRE WEAKLAND TO KILL HILDA, SO HE IS ACTUALLY INNOCENT OF MURDER AND ROBBERY. 29

A. The Conviction of Someone Who is Actually Innocent Violates the Constitution. 30

B. Frank is Innocent. 33

1. The State's theory is unworthy of belief. 33

2. Weakland did not kill Hilda. 34

a. Weakland's testimony does not match the physical evidence. 35

b. The DNA evidence suggests someone else killed Hilda. 37

c. Weakland is an entirely incredible witness. 40

3. Frank is not a plausible suspect, but the following people are. 43

a. Joey Costanza. 43

b. Marvin Krause. 47

c. Rosalie acting alone. 50

d. Weakland acting alone. 50

C. The State Court's Purported Evidence of Frank's Guilt is Threadbare. 51

D. Frank Has Continually Fought To Prove His Innocence. 57

III. THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO CONVICT FRANK OF MURDER AND ROBBERY. 58

IV. FRANK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL. 61

A. Frank's Attorneys Failed to Explain to the Jury Why Weakland Switched His Testimony Again to Accuse Frank. 62

B. Frank's Attorneys Failed to Secure the Testimony of Joey Costanza, a Crucial Defense Witness 67

1. Costanza had crucial information to tell the jury. 67

2. The failure to arrange for Costanza's testimony at trial violated Frank's Sixth Amendment rights. 70

V. THE DISTRICT COURT WRONGLY HELD THAT FRANK'S CROSS-EXAMINATION CLAIM WAS UNEXHAUSTED. 73

CONCLUSION 75

STATEMENT OF RELATED CASES 75

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Federal Cases

Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003) 73
Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1996) 31, 67
Cleveland v. Bradshaw, 693 F.3d 626 (6th Cir. 2012) 65
Cooper v. Sec'y, Dep't of Corr., 646 F.3d 1328 (11th Cir. 2011) 67
Cullen v. Pinholster, 563 U.S. 170 (2011) 66
Davis v. Alaska, 415 U.S. 308 (1974) 74
Davis v. Clark Cnty., 966 F. Supp. 2d 1106 (W.D. Wash. 2013) 38
Griffin v. Johnson, 350 F.3d 956 (9th Cir. 2003) 32
Herrera v. Collins, 506 U.S. 390 (1993) 5, 27, 30
Hill v. Lockhart, 474 U.S. 52 (1985) 62
House v. Bell, 547 U.S. 518 (2006) 30, 54, 55
Hurles v. Ryan, 752 F.3d 768 (9th Cir. 2014) 54, 71
In re Davis, 130 S.Ct. 1 (2009) 30, 51
Jackson v. Virginia, 443 U.S. 307 (1979) ..... passim
Jones v. Taylor, 763 F.3d 1242 (9th Cir. 2014) 30
Lee v. Lampert, 653 F.3d 929 (9th Cir. 2011) 32
Lisker v. Knowles, 463 F. Supp. 2d 1008 (C.D. Cal. 2006) 55
Maxwell v. Roe, 628 F.3d 486 (9th Cir. 2010) 51, 55
Merritt v. Countrywide Fin. Corp., 759 F.3d 1023 (9th Cir. 2014) 74
Munchinski v. Wilson, 694 F.3d 308 (3d Cir. 2012) 34, 43
Nasby v. McDaniel, 853 F.3d 1049 (9th Cir. 2017) 32
Nickerson v. Roe, 260 F. Supp. 2d 875 (N.D. Cal. 2003) 43
Peterson v. Lampert, 319 F.3d 1153 (9th Cir. 2003) (en banc) 74
Rose v. Lundy, 455 U.S. 509 (1982) 73
Runningeagle v. Ryan, 686 F.3d 758 (9th Cir. 2012) 29
Sandgathe v. Maass, 314 F.3d 371 (9th Cir. 2002) 73
Schlup v. Delo, 513 U.S. 298 (1995) 31, 32

Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002) 32
Souter v. Jones, 395 F.3d 577 (6th Cir. 2005) 36
Strickland v. Washington, 466 U.S. 668 (1984) ..... passim
Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004) 51, 57, 59
Triestman v. United States, 124 F.3d 361 (2d Cir. 1997) 51
Valley Broadcasting Co. v. U.S. Dist. Court for Dist. Of Nevada, 798 F.2d 1289 (9th Cir. 1986) 46
Vang v. Nevada, 329 F.3d 1069 (9th Cir. 2003) 29
Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010) 16
Wiggins v. Smith, 530 U.S. 510 (2003) 67
Wilkerson v. Cain, 233 F.3d 886 (5th Cir. 2000) 67
Williams v. Brown, 208 F. Supp. 3d 713 (E.D. Va. 2016) 34

Federal Statutes, Rules, and Constitutional Provisions

28 U.S.C. § 2253 1
28 U.S.C. § 2254 ..... passim
Fed. R. App. P. 4(a)(1)(A) 1
U.S. Const. amend. V 30
U.S. Const. amend. VIII 30
U.S. Const. amend. XIV 30

State Cases

Crew v. State, 100 Nev. 38, 675 P.2d 986 (1984) 74
LaPena v. Sheriff, 91 Nev. 692, 541 P.2d 907 (1975) 60
LaPena v. State, 96 Nev. 43, 604 P.2d 811 (1980) 14
Weakland v. State, 96 Nev. 699, 615 P.2d 252 (1980) 14

State Statutes

F.S.A. § 942.01-942.06 70
N.J.S.A. § 2A-81-18 70

Other

Casino (Martin Scorsese, dir., 1995) 2
Dennis N. Griffin, The Battle for Las Vegas (2006) 46, 49
Robert Dickey, Greyhound to Vegas (2010) 49

STATEMENT OF JURISDICTION

This is an appeal from a final judgment entered on May 11, 2015, denying Frank Ralph LaPena's petition for a writ of habeas corpus. Supplemental Excerpts of Record ("SEOR") 3-19. The district court had jurisdiction under 28 U.S.C. § 2254.

Frank filed a timely notice of appeal on June 9, 2015. SEOR 1-2; *see* Fed. R. App. P. 4(a)(1)(A). On March 14, 2016, this Court issued a certificate of appealability covering five issues, including the four issues discussed in this brief. Excerpts of Record ("EOR") 6221. This Court has jurisdiction under 28 U.S.C. § 2253.

INTRODUCTION

The year was 1974. The town—Las Vegas. Organized crime dominated the Strip. Gangsters and their associates controlled the casinos, from Irving "Ash" Resnick at Caesars Palace to Frank "Lefty" Rosenthal (and his enforcer, Tony "the Ant" Spilotro) at the Stardust. *Cf.* Casino (Martin Scorsese, dir., 1995). Mafia syndicates had found a river of money flowing through the parched desert valley, and they protected it at all costs.

This setting has produced many wild stories, but none as incredible as Frank LaPena's. His odyssey began when the State accused him of an unlikely crime, one that seems ripped from the pages of a pulp novel. Frank, you see, was a handsome young bell captain at the Hacienda. He was dating Rosalie Maxwell, a beautiful cocktail waitress at Caesars. Rosalie was two-timing Frank with Marvin Krause, a middle-aged slot manager (also at Caesars). Marvin showered Rosalie with cash and gifts, but Marvin's wife Hilda controlled the Krause fortune.

According to the State, Frank and Rosalie wanted Hilda's money, and they hatched a convoluted plot to get it. They hired their pal Jerry Weakland to kill Hilda. With Hilda gone, Rosalie would swoop in and

marry Marvin. Then something untoward might happen to Marvin. By the end of this scheme, the money would have passed from Hilda to Marvin and then to Rosalie—with Frank, her true love, waiting in the wings to share it.

At least, that's the story Weakland told, after the State offered him a sweetheart deal and after he confessed to murdering Hilda. Only one problem. Weakland didn't kill Hilda. He's always said he slit her throat with a single cut, no more, but that's not how she died. Instead, someone strangled her, then slit her throat, then stabbed her, repeatedly and violently, in the neck—a crime of passion, not a clinical contract killing. Weakland's testimony about the murder doesn't begin to match up with the physical evidence. But if Weakland didn't kill her, who did?

That simple question has confounded the courts for almost half a century. A dozen defense lawyers have fought for Frank, including mayor-to-be Oscar Goodman and Senator-to-be Harry Reid. Frank's case spawned perhaps the longest preliminary hearing in Nevada history, two lengthy jury trials—not to mention Rosalie's trial and acquittal—stacks of court orders, endless evidentiary hearings, and a later-overturned ha-

beas grant from a state trial judge. The Nevada pardons board ultimately commuted Frank's sentence, but only after hearing shocking testimony from a former state judge, who said the cops refused to let Weakland implicate Marvin.

Throughout every moment of this unfathomable gauntlet, Frank has maintained his innocence. In fact, after the Nevada Supreme Court tossed his first conviction, the State proposed a plea deal for time served. Almost anyone would've jumped on that offer. But Frank turned it down, and he spent another fifteen years in jail because he refused to take a plea for a crime he did not commit. Frank is out on parole now and is nearing his eighties, but he is still struggling to clear his name.

Four decades later, we may never know who killed Hilda. But one thing is certain: Frank had nothing to do with it. This Court should declare his innocence and end this saga for good.

CERTIFIED ISSUES PRESENTED FOR REVIEW

1. Is Frank actually innocent of arranging Hilda's murder, within the meaning of *Herrera v. Collins*, 506 U.S. 390, 417 (1993)?
2. Did the State present sufficient evidence to convict Frank?
3. Was trial counsel ineffective because, among other things, they failed to tell the jury that Gerald Weakland (the person who purportedly killed Hilda) made a second deal with the State in exchange for his testimony against Frank?
4. Did the district court improperly conclude that one of Frank's claims was unexhausted?[1]

BAIL STATUS OF APPELLANT

The State commuted Frank's sentence of life without the possibility of parole to life with the possibility of parole (EOR 6290) and ultimately released him in 2005. He is still subject to lifetime parole conditions.

[1] This Court certified additional issues that Frank addressed in his informal brief. Dkt. No. 6. Frank does not intend to forfeit or waive any issues not discussed in this supplemental brief.

STATEMENT OF THE CASE

Frank's case spans over four decades. His odyssey covers roughly five acts.

A. Someone Kills Hilda; an Informant Points the Police to Weakland; Weakland Gets a Deal and Fingers Frank.

Just after dawn on January 14, 1974, at least two assailants broke into the home of Hilda and Marvin Krause, and somebody killed Hilda. We may never know what really happened, but the following series of events seems likely.

At least two perpetrators, Gerald ("Jerry") Weakland and Tom Boutwell, entered the Krause home that morning. Weakland was a former boxer who worked as a pool boy at Caesars Palace. SEOR 1503, 1557. Boutwell was a former football player who was visiting Las Vegas and staying with his old teammate, Robert ("Bobby") Webb. SEOR 1943-45. Weakland and Webb were friends.

On January 12, 1974, Boutwell and Webb ran into Weakland at Caesars. Weakland said he had a job for Webb. SEOR 1500-01. Early on Monday, January 14, Weakland came to Webb's house to pick him up for the job. Webb proposed that Boutwell go instead. SEOR 1511-13.

Weakland told Boutwell the plan was to rob a man who carried a lot of cash on him. *Id.* Boutwell agreed to help out. *Id.*

Boutwell didn't know it at the time, but Weakland's target was Marvin Krause, a slot manager at Caesars. Marvin left for work early on Mondays and Fridays to attend the slot "drop," when Caesars employees collected coins from the machines. SEOR 1741-42, 1748-50. That's when Weakland wanted to hit Marvin. SEOR 1507-08.

Weakland and Boutwell left Webb's apartment at about 5:00 a.m. SEOR 1955. Weakland was driving his ex-wife Gail's Monte Carlo. SEOR 1958. The pair drove to a parking lot outside the Las Vegas Country Club. They scaled a wall surrounding the gated community and found themselves near the Krause residence. SEOR 1515-16.

As they waited for Marvin to leave, a taxi cab pulled up to the house. An unknown woman (not Rosalie, apparently) got out of the cab and rang the doorbell. Someone answered the door. A couple minutes later, the woman got back in the cab, and the cab drove away. SEOR 1517.

Soon after, Marvin opened his garage door. Weakland and Boutwell ran in. They grabbed Marvin, dragged him inside, and marched him upstairs. SEOR 1518. Hilda came out of her bedroom (the southeast

bedroom), and the assailants ordered both Krauses into that bedroom. Weakland pistol-whipped Marvin in the head and brought Hilda into the other bedroom (the north bedroom). SEOR 1519-22. Boutwell rummaged around for valuables but didn't find much. SEOR 1966-68. Weakland took a watch and a ring from Marvin. SEOR 1519. The pair also took a television. SEOR 1975-77. They left the scene in Marvin's car and noticed another car parked nearby with its lights on. SEOR 1977-78. They drove back to the Monte Carlo, switched cars, and headed to Webb's apartment. SEOR 1980-84.

At some point that morning, someone killed Hilda in the north bedroom. Weakland testified at Frank's second trial that Weakland committed the murder himself, but that is not true. *See* Section II(B)(2), *infra.*

According to Marvin, he passed out when Weakland hit him in the head; when he woke up, Hilda was dead, and he called the police. There are reasons to disbelieve his story. *See* Section II(B)(3)(b), *infra*.

Later on, Marvin told the cops he was having an affair with Rosalie Maxwell, a cocktail waitress at Caesars. SEOR 2414-15. The cops interrogated Rosalie. She admitted to sleeping with Marvin but said her true

love was a man named Frank LaPena. SEOR 2416-18. This love triangle intrigued the police.

After hearing about Hilda's death, a confidential informant named Joey Costanza called Detective Mike Whitney. EOR 5592. Costanza told Whitney that someone had approached him in early December about a job that sounded like the Krause crime. *Id.* Costanza later clarified that the person who approached him was Jerry Weakland. EOR 5593.

The police arrested Weakland on March 13, 1974. The State charged him with murder. SEOR 1839. His lawyer, Michael Cherry (the current Chief Justice of the Nevada Supreme Court), negotiated the deal of a lifetime: Weakland would plead to second-degree murder, and instead of facing the death penalty, he would be eligible for parole in five years.

As part of the deal, Weakland agreed to name his co-conspirators. He told the following story to the police. He said Frank and Rosalie had hired him to kill Hilda. EOR 4. The key meeting took place on January 2, 1974. EOR 15. (Weakland would later say it was January 4.) At this meeting, Frank and Rosalie paid Weakland $1,000 and promised another $10,000 later. EOR 5.

According to Weakland, Frank and Rosalie had an unlikely motive for wanting Hilda dead. Rosalie was dating Marvin. Marvin would give her gifts and money, but Hilda was standing in the way. Frank and Rosalie wanted Hilda gone so that Rosalie could get together with Marvin, who would start sharing more money with Rosalie. EOR 5-6.

Weakland named Boutwell as his accomplice but said Boutwell hadn't known about the murder plot. EOR 4, 6.

B. The State Charges Frank and Rosalie; Weakland Recants; the Juries Acquit Rosalie and Convict Frank.

After Weakland cut his deal and told his fantastical account of the conspiracy, the State charged Frank, Rosalie, and Boutwell with murder and robbery. The police also arrested Webb, but he ultimately avoided charges in the Krause case. *See infra* at 12-13.

The State held a single preliminary hearing for Frank, Rosalie, and Boutwell. The lead prosecutor was Melvyn "Mel" Harmon. The hearing lasted 13 days and spanned multiple months. Oscar Goodman, the eventual mayor of Las Vegas, represented Frank. During the hearing, Weakland testified against the three defendants and accused Frank and Rosalie of hiring him to kill Hilda. EOR 69-81. The court found probable cause for Frank and Rosalie to stand trial.

As for Boutwell, the court dismissed his murder charge. Boutwell pled guilty to robbery. SEOR 2010, 2019. He got probation.

Frank filed a pre-trial habeas petition, arguing that the State presented insufficient evidence at the preliminary hearing. The Nevada Supreme Court denied the writ on January 2, 1976. EOR 1209-15. Under Nevada law, the testimony of accomplices is not enough to find a defendant guilty; there must be additional inculpatory evidence. A three-justice majority found that the testimony of Gail Hodges (Weakland's ex-wife) corroborated Weakland's accusations.

Two justices dissented. Chief Justice E.M. "Al" Gunderson picked apart the State's case, writing that "nothing plus nothing plus nothing is nothing." EOR 1225.

Frank and Rosalie proceeded to separate trials. Both defendants asked the State to disclose the name of the confidential informant who had first tipped off the police about Weakland. The trial courts denied the requests. EOR 1236, 3356-57.

Rosalie's trial began on July 13, 1976. The State called Weakland. He delivered a dramatic recantation: "This lady had nothing to do with this crime. Any statements I made against her I lied about and I did on

my own to protect my family." EOR 1381. Weakland refused to answer any more questions about the crime. Harmon (the prosecutor) threatened to pull Weakland's deal if he kept it up. EOR 1401-02. Weakland stayed silent. The State introduced his prior accusations against Rosalie. After a 26-day trial, the jury acquitted Rosalie.

Frank's trial began on March 14, 1977. His lead attorney was Harry Reid. The State called Weakland. He confirmed that he had lied when he originally implicated Frank and Rosalie (EOR 3571, 3578-81), and he refused to answer further questions. Once again, the State admitted his prior accusations. After an 18-day trial, the jury convicted Frank. EOR 4815-16. He maintained his innocence at sentencing. EOR 4821.

A few months later, the State tried Frank for the attempted murder of Willis Obenauer. Obenauer was a manager at the Hacienda, where Frank was a bellman. Two assailants abducted Obenauer early on November 24, 1973. They drove Obenauer to the desert and shot him in the knees. The police believed Weakland and Webb were the two culprits. As part of Weakland's plea bargain in the Krause case, the State agreed not to prosecute him for the Obenauer case. SEOR 1576-77. (For his

part, Webb pled guilty to a gross misdemeanor in the Obenauer case, and the State agreed not to prosecute him for the Krause case. SEOR 2124; EOR 4936-37.)

Reid represented Frank at this trial, too. The defense chose a bench trial. The State called Weakland to testify. Weakland had previously said Frank paid him to attack Obenauer, but at trial he purported not to remember anything. EOR 4971, 4983-84. Once again, the State admitted Weakland's prior accusations. In addition, Webb testified against Frank.

Weakland and Webb gave unlikely statements against Frank in the Obenauer case. According to them, they had a meeting with Frank shortly before the assault during the evening of November 23. EOR 4915-20; EOR 5000-01. That was not true: Frank was hosting a party that night, and five eyewitnesses testified Frank had no opportunity to plot out a crime. EOR 5067-121. Meanwhile, Webb originally told his girlfriend *Weakland's brother* arranged the assault, not Frank. EOR 5057. Nonetheless, the judge found Frank guilty. EOR 5213-14.

Frank successfully appealed both convictions. SEOR 65-66; *La-Pena v. State*, 96 Nev. 43, 604 P.2d 811 (1980). The State did not retry Frank for the Obenauer case.

C. After a Reversal, the State Cuts a New Deal with Weakland, Discloses the Informant's Name, and Tries Frank Again.

After lengthy and consequential pre-trial proceedings, the State re-tried Frank and won another conviction.

1. *The State writes poison pen letters to the parole board, and Weakland agrees to cooperate if the State stops.*

The State was furious that Weakland had recanted. It responded in three ways.

First, the prison put Weakland in a more restrictive security level. EOR 3587, 4983. Second, the State charged Weakland with perjury. The jury convicted him, but the Nevada Supreme Court reversed the convictions. In doing so, it remarked that there was "not overwhelming" evidence Weakland committed perjury. *Weakland v. State*, 96 Nev. 699, 615 P.2d 252, 254 (1980). On remand, Weakland entered an *Alford* plea and received probation. SEOR 51.

Third, the State wrote devastating letters about Weakland to the parole board. *See infra at* 62-64. The letters were killing Weakland's chances at parole, so he struck yet another deal. Weakland agreed to un-

recant and testify against Frank. In exchange, the State would stop sending the poison pen letters. The parties signed an agreement on September 28, 1982 (EOR 5252), and Weakland testified to the grand jury the next day (EOR 5264-303). The grand jury indicted Frank. EOR 5361-62. The District Attorney immediately wrote a letter to the parole board, saying that Weakland was "fully cooperative" and "testifying truthfully." EOR 5253. The letter asked the board to "consider Mr. Weakland's cooperation in its subsequent proceedings." *Id.*

2. *The Nevada Supreme Court forces the State to disclose the informant's name; the defense fails to secure his testimony.*

After the indictment, it took almost seven years to bring Frank to trial. The reasons involve the confidential informant, Joey Costanza.

a. The defense learns Costanza's name.

The informant—Joey Costanza—was a crucial defense witness. *See* Section IV(B)(1), *infra*. In short, Costanza told the police Weakland approached him in early December 1973 about the Krause job. At that time, Costanza said, Weakland described the specifics of the proposed crime. But Weakland testified that he did not learn those specific details until he met with Frank and Rosalie on January 2 or 4, 1974. This discrepancy

suggests Weakland was lying—not just about the crucial January 2 (or 4) meeting, but about Frank's involvement, too.

Frank insisted on learning the informant's identity. EOR 5230-51. The trial court denied the request. In response, Frank filed a petition for a writ of mandamus with the Nevada Supreme Court.

The court granted the petition on August 31, 1983, forcing the State to disclose the informant or drop the case. According to the court, Weakland was the key to the State's case, and "the informant has advised police of statements by Weakland which are inconsistent with Weakland's testimony." SEOR 1438. The informant's importance as a defense witness was "manifest," so the State had to disclose his name. SEOR 1438-39.

Detective Whitney refused to reveal his informant's name. In turn, Harmon (the prosecutor) approached Chuck Lee, the former lead detective on Hilda's murder who had left the local police for the DA's office after being named in an FBI corruption investigation. EOR 5223-24.[2]

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[2] Although this article was not part of the record below, the Court may take judicial notice of it. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010).

Harmon told Lee to ask Weakland who the informant was. Weakland thought it was Costanza. SEOR 1111-15. To make sure, Harmon sent Lee to New Jersey to speak with Costanza in October 1983. Lee and Costanza met for at least three hours. SEOR 810-11, 822. Costanza refused to come back to Nevada to testify. He said he and his family "would be in jeopardy" if he did, although Frank was not the source of his fear. SEOR 820-23; *see infra* at 45-46.

The State disclosed Costanza's name on October 17, 1983. At that time, Gary Gowen represented Frank. Gowen sent a letter to Costanza, who called him a couple weeks later. Costanza elaborated on his conversation with Weakland in December 1973. SEOR 912-13. That additional information discredited Weakland even further. *See infra* at 72. Despite getting this dynamite information, Gowen kept it to himself until after Frank's second trial. SEOR 419, 996-97.

b. The defense fails to secure Costanza's testimony.

Frank filed a motion to depose Costanza in June 1984. EOR 5450-53. Later that year, he asked the trial court to order the State to disclose its entire file on Costanza. EOR 5454-58. The court denied these requests. Frank filed another petition for a writ of mandamus. On appeal,

the State agreed to disclose the file, but it resisted Frank's efforts to depose Costanza.

The Nevada Supreme Court held oral argument on the petition. During the argument, Justice Gunderson made a stunning disclosure. He said he spoke at one point to Addelair "Del" Guy, who at the time of the conversation was a state trial court judge but who in 1974 was a member of the DA's office. According to Judge Guy, "Mr. LaPena was not the first individual nor even only the second individual that Mr. Weakland incriminated." EOR 5631. Rather, Weakland originally named *Marvin* as the person who hired him to kill Hilda. The State didn't like that story. Weakland then named an unknown second person. The State didn't like that story, either. "[F]inally Mr. Weakland agreed to tell the story that he ultimately told." EOR 5632. Justice Gunderson called that story an "incredible" "house that Jack built theory." *Id.* In sum, Justice Gunderson said, Frank "was the third person that Mr. Weakland was willing to incriminate under entirely different stories in exchange for favorable treatment." *Id.*

The Nevada Supreme Court granted the petition on October 22, 1985. It reiterated that Costanza was a "crucial defense witness." SEOR

1442. The court also noted its "grave concern" about "the tenor of these proceedings against" Frank. SEOR 1443. It reminded the DA's office that its "paramount duty is to seek justice, not to convict." *Id.*

The State turned over its Costanza file, save for a single report. The State refused to disclose this report because it involved informants who were close to the Costanzas who had provided information about "persons involved in organized crime, and also [] persons who have been responsible for several murders in the past." EOR 5519. It later clarified these "persons" were members of the notorious Hole in the Wall gang. EOR 5797; *see infra* at 45-46.

After the second mandamus order, Gowen received a material witness warrant for Costanza's arrest. EOR 5459-70; *see also* SEOR 915-17. Costanza was in Florida at the time. The Florida police arrested Costanza, but the local DA's office called Harmon and warned him the local courts had scheduled a release hearing for the next day. SEOR 1121-22. Harmon tried to call Gowen, then took it upon himself to handle the situation. He sent Lee to Florida. Lee got to the hearing, but Harmon had not given him the right paperwork; the judge released Costanza. SEOR 918-21.

After that escapade, defense investigator Michael Wysocki repeatedly tried to contact Costanza. Wysocki visited him in Florida in April 1985. Costanza refused to speak to Wysocki, telling him to talk to his lawyer, George Foley (SEOR 854)—the brother of Judge Thomas Foley, who was presiding over Frank's case. Wysocki tracked Costanza down again in New Jersey in July 1986. When he showed up at his house, Costanza became "very, very irate." SEOR 855. He made various "threats"—he said, "You know who I am," and he warned that messing with him could prove "really dangerous." SEOR 859. Eventually, two men pulled up in a Volkswagen, and one of them took a chain saw out of the trunk. By then, Costanza had cooled down, so he waived off the goons. SEOR 859-60.

After these visits, Costanza wrote a letter to a Nevada trial judge. He complained about Wysocki's attempts to contact him and professed that he and his wife "are retired folks and want to be able to enjoy our family and live in peace." EOR 5653. He said he did not know Frank and had no knowledge of any connection between Frank and Weakland. *Id.*

The trial court held a hearing on March 17, 1987. Gowen described the defense's efforts to depose Costanza. EOR 5658-59. Harmon suggested the defense was failing to secure Costanza's testimony because they weren't using the procedures of the Uniform Act to Secure the Attendance of Witnesses. EOR 5662-63; *see also* SEOR 1119, 1145. The court had previously issued a certificate of materiality (the first step under the Act), and the court issued another one; the defense did nothing with it. EOR 5668-69; SEOR 915, 988-92.

The defense filed a motion questioning whether the State had fully disclosed its information on Costanza. The court denied the motion. *See* EOR 5710. The defense filed yet another mandamus petition, which the Nevada Supreme Court once again granted. EOR 5716. The trial court held a two-day evidentiary hearing and ruled that the State had complied with its obligations. EOR 5977-78.

The court held a final pre-trial hearing on January 9, 1989. It complained about the defense's unsuccessful efforts to secure Costanza's testimony. EOR 5980-82. Again, Harmon blamed the defense for not using the Act. EOR 5982. The court said it would not spend another cent on

Costanza until the defense tried using the Act. EOR 5984-85. The defense did not follow that advice.

3. *Frank refuses a deal for his freedom.*

As the parties geared up for the second trial, the State made an incredible offer: Frank could enter an *Alford* plea and get a time-served sentence. SEOR 485. Frank turned it down.

4. *The case goes to trial again, the jury convicts Frank, and the Nevada Supreme Court affirms.*

Frank's second trial started on May 9, 1989. By then, Lamond Mills and George Carter represented Frank. Carter stayed on the case even though he had criminal contempt charges pending against him in an unrelated case. SEOR 457-60.

The State called Weakland. He testified that Frank and Rosalie hired him to kill Hilda. SEOR 1500. The defense did not ask him about his second deal with the State regarding the parole letters, and it did not call Costanza. *See* Section IV, *infra*. After an eight-day trial, the jury convicted Frank. At sentencing, Frank again maintained his innocence. EOR 6053.

Frank filed a direct appeal. The Nevada Supreme Court affirmed on June 27, 1991. SEOR 59-62.

D. Frank Repeatedly Tries to Clear His Name in State Court.

Frank has had many rounds of state court post-conviction litigation. This brief focuses on three.

1. *Frank wins his first post-conviction petition, but the Nevada Supreme Court takes his freedom back.*

Frank filed a pro se state court petition for a writ of habeas corpus on June 3, 1992. SEOR 1202-307. The trial court summarily denied it. EOR 6054-58. On appeal, the Nevada Supreme Court remanded for an evidentiary hearing. EOR 6060. Back in the trial court, Frank filed a motion to dismiss the indictment on the grounds that he is actually innocent. EOR 6062-94.

The court appointed David Schieck to represent Frank. Frank testified at the evidentiary hearing. He denied hiring Weakland to kill Hilda. SEOR 1076. The court found him to be a "credible, well-spoken witness." SEOR 418.

The court granted Frank's petition on October 13, 1996. SEOR 423-24. It held that Frank received ineffective assistance at trial, including for the reasons discussed in this brief. SEOR 417-19; *see* Section IV, *infra*. The court denied the motion to dismiss and set the case for trial.

The State appealed. The Nevada Supreme Court reversed and reinstated Frank's convictions. SEOR 57. Chief Justice Springer dissented. He called Weakland a "notorious perjurer and murderer" and described the many "questions and weaknesses" in the State's case. SEOR 57.

At the time, Frank was out on bail and living near the border with Mexico. When he heard the news, he went back to Las Vegas and turned himself in. EOR 6244.

2. *The pardons board commutes Frank's sentence*.

The court had sentenced Frank to life without the possibility of parole. SEOR 1494. Frank filed a sentence commutation application on April 22, 2002. EOR 6224-37. The pardons board held a hearing on December 12, 2003. Retired Justice Gunderson attended and again explained how Weakland had named two other individuals (including Marvin) before he implicated Frank. EOR 6276-79.

The pardons board commuted Frank's sentence to life with the possibility of parole. EOR 6288, 6290. Frank received parole and was released on February 8, 2005. He has been living in the Las Vegas area ever since. He works at the Mob Museum.

3. *Frank is currently litigating a DNA petition in state court.*

Frank filed a state court petition on June 10, 2011, asking for DNA testing of items from the crime scene. EOR 6291-95. Those tests produced important evidence. *See* Section II(B)(2)(b), *infra*. The DNA results suggest some unknown individual—not Weakland, not Marvin, not Boutwell—strangled Hilda. That scenario is inconsistent with Weakland's account.

Frank asked for a new trial based on this new DNA evidence. The trial court denied the request on August 4, 2017. EOR 6435. It agreed that the DNA evidence impeached Weakland's story, but it thought the evidence was cumulative. EOR 6432-34. The court also thought the evidence was unhelpful, since it pointed to someone other than Marvin as the murderer; according to the court, Frank's theory is that Marvin killed Hilda, and the DNA evidence did not support that specific theory. EOR 6434-35.

Frank has appealed the trial court's decision. That appeal is still pending.

E. Frank Challenges His Convictions In Federal Court.

Frank filed his pro se federal habeas petition pursuant to 28 U.S.C. § 2254 on or about September 22, 2000. SEOR 175-252. The district court originally dismissed the petition as untimely (SEOR 42-43), but this Court reversed that determination (EOR 6218-19).

After the district court mailed some documents to Frank and they came back undeliverable, it dismissed the case for failure to prosecute. ECF Nos. 121, 122.[3] Frank filed a motion to reinstate his case, which the court denied on August 7, 2007. SEOR 39-40.

Frank filed another motion to reinstate on June 1, 2012. He had somehow found a copy of a file-stamped change of address form he mailed to the clerk in 2005; the clerk failed to update his address, which is why his mail came back undeliverable. ECF No. 127 at 3. (He had also served the form on the State. ECF No. 130.) The State asked the court to deny Frank's "frivolous and vexatious motion." ECF No. 128 at 2. The court reopened Frank's case. SEOR 34-38.

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[3] Citations to "ECF No." refer to the lower court's docket entries. Citations to "Dkt." refer to this Court's docket entries.

After further briefing on Frank's petition, the district court denied it and declined to grant a certificate of appealability. SEOR 19.

Frank appealed. SEOR 1-2. This Court granted Frank a certificate of appealability on five issues. EOR 6221. After a full round of briefing (Dkt. Nos. 6, 12, 22), the Court appointed counsel for Frank and requested the filing of this counseled supplemental opening brief. Dkt. Nos. 20, 28.

SUMMARY OF ARGUMENT

Frank LaPena did not hire Jerry Weakland to kill Hilda Krause. He is actually innocent, and his convictions violate the Constitution. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993). Among the biggest holes in the State's case is the manner of death. The State believes Weakland killed Hilda. Whoever killed Hilda strangled her, then slit her throat, then stabbed her in the neck multiple times with great force. While Weakland testified that he slit Hilda's throat, he denied strangling her or stabbing her neck. That is a blatant inconsistency, and it leads to one conclusion: Weakland did not kill Hilda. And if Weakland did not kill Hilda, then Frank cannot be guilty.

For similar reasons, the State presented insufficient evidence at trial to convict Frank. *See Jackson v. Virginia*, 443 U.S. 307 (1979). The jury could not have rationally found that Weakland killed Hilda, so it could not have properly convicted Frank. Putting that aside, the State presented insufficient evidence to corroborate Weakland and Webb's testimony against Frank.

Making matters worse, Frank received ineffective assistance from trial counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). His attorneys failed in at least two areas. Weakland recanted at Frank's first trial, and then un-recanted and testified against Frank at the second trial. Frank's lawyers did not tell the jury why Weakland changed face. The explanation is damning: if Weakland hadn't, he would have never gotten parole. Frank's attorneys dropped the ball again when they failed to secure the testimony of Joey Costanza, who would have impeached Weakland even further.

Finally, the district court mistakenly concluded that one of Frank's claims was unexhausted, which warrants a remand.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* a district court's denial of a petition for a writ of habeas corpus. *See Runningeagle v. Ryan*, 686 F.3d 758, 766 (9th Cir. 2012). It also reviews *de novo* a district court's determination that a claim is unexhausted. *See Vang v. Nevada*, 329 F.3d 1069, 1072 (9th Cir. 2003).

Under 28 U.S.C. § 2254(d), a federal court may grant relief on the basis of a claim that a state court adjudicated on the merits only if the state court's 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.

II. FRANK DID NOT HIRE WEAKLAND TO KILL HILDA, SO HE IS ACTUALLY INNOCENT OF MURDER AND ROBBERY.

The State believes that Frank and Rosalie hired Weakland to kill Hilda. That is not true. The State's theory—a love triangle leading to a double murder and a double inheritance—is desperately convoluted. It has countless holes, most notably the fact that Weakland did not kill

Hilda. So who plotted her death? The possibilities are endless, but Costanza or Marvin are good bets. We may never definitively answer that question, but one thing is certain: Frank was not involved.

A. The Conviction of Someone Who is Actually Innocent Violates the Constitution.

The Constitution prohibits the conviction of someone who is actually innocent. That is true as a matter of procedural and substantive due process, as well as the ban on cruel and unusual punishment. U.S. Const. amends. V, VIII, XIV.

The United States Supreme Court has signaled that the imprisonment (and especially the execution) of an innocent person violates the Constitution. In *Herrera v. Collins*, 506 U.S. 390 (1993), the Court assumed without deciding that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief." *Id.* at 417; *see also In re Davis*, 130 S.Ct. 1 (2009) (remanding original habeas petition for a hearing on the petitioner's innocence); *House v. Bell*, 547 U.S. 518, 554-55 (2006); *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014) (assuming without deciding that *Herrera* claims are available in non-capital habeas cases). A majority of Justices in *Herrera* would have held that proof of

actual innocence warrants relief. *See Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1996).

The Ninth Circuit has elaborated on a petitioner's burden of proof on a *Herrera* claim. In *Carriger*, the Court said that "to be entitled to relief, a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." 132 F.3d at 477-78.

The evidentiary rules that govern *Herrera* claims are unsettled, but so-called "gateway" innocence claims have clear guidelines. Those guidelines may apply to *Herrera* claims.

A habeas petitioner can allege innocence in two different ways: as a substantive constitutional violation, and as a "gateway" claim to excuse procedural deficiencies, *see Schlup v. Delo*, 513 U.S. 298, 327 (1995). The burden of proof for "gateway" claims is lower than for substantive claims. *Compare Schlup*, 513 U.S. at 324; *with Carriger*, 132 F.3d at 477-78. Because Frank can prove his innocence under *Herrera*, he can *a fortiori* prove his innocence under *Schlup*, and most if not all potential procedural issues would vanish.

In the context of "gateway" claims, petitioners must also present new evidence of innocence that was not before the jury. *See Schlup*, 513 U.S. at 327; *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003). Then, the court may consider "all the evidence" in the record, "old and new, incriminating and exculpatory, admissible at trial or not." *Lee v. Lampert*, 653 F.3d 929, 932, 943 (9th Cir. 2011). The *Herrera* analysis may well follow these rules. If so, there is plenty of new evidence of Frank's innocence. *See, e.g.*, Section II(B)(2)(b), *infra* (DNA evidence); *supra* at 18, 24 (Justice Gunderson's exculpatory comments); Section IV, *infra* (evidence not presented because of attorney ineffectiveness).

Finally, an actual innocence inquiry requires a review of all the relevant evidence, including new evidence and all the evidence in the state court record. *See Lee*, 653 F.3d at 932, 943. Frank is therefore relying on the entire record in this case (as well as Rosalie's case and the Obenauer case) to argue his innocence. While the State did not submit all these documents to the district court, this Court should take judicial notice of them. *See Smith v. Duncan*, 297 F.3d 809, 815 & n.2 (9th Cir. 2002); *cf. Nasby v. McDaniel*, 853 F.3d 1049, 1052-54 (9th Cir. 2017). Additionally, Frank has filed a motion for the Court to expand the record to

include developments postdating the Nevada Supreme Court's 1998 decision. The Court should grant that motion, consider all the relevant evidence, and declare Frank's innocence.

B. Frank is Innocent.

Frank did not hire Weakland to kill Hilda. The State's theory of the case—that Frank and Rosalie wanted Hilda dead so Rosalie could marry Marvin and Weakland could kill Marvin and Rosalie and Frank could get Hilda's money—is outlandish. Even if that story were credible, the physical and DNA evidence prove Weakland did not kill Hilda, which crushes the State's case. While we may never find out who actually arranged Hilda's death, a litany of alternate suspects are more likely than Frank. None of the evidence the State points to suggests otherwise.

1. *The State's theory is unworthy of belief.*

The State prosecuted Frank on the following theory. Frank and Rosalie were dating. Rosalie was also seeing Marvin. Marvin was married to Hilda, the wealthier half of the couple. Frank and Rosalie wanted Hilda dead so that Marvin would inherit Hilda's money and Rosalie could marry Marvin. Then Weakland would kill Marvin, and Rosalie would inherit the entire Krause fortune. She could then share the fortune with

her true love, Frank. *See, e.g.*, SEOR 50, 59, 480, 1502, 1508-09, 2090-91; *see also* EOR 4644-55.

This scheme faced serious snags. Rosalie was still married to her husband Don at the time of Hilda's death, and there is no evidence she had started divorce proceedings—a necessary first step in the supposed plot. *See* SEOR 480-81, 547-48. Similarly, the plan required that Marvin would want to marry Rosalie. There is little evidence he did. The plot also made assumptions about wills: that Marvin was in Hilda's will, and that Marvin would put Rosalie in his will. Finally, it would look fishy when both Hilda and Marvin suffered untimely deaths.

While criminals sometimes commit ill-advised crimes, this supposed plot is beyond far-fetched—it is "implausible" and "bizarre." *See Munchinski v. Wilson*, 694 F.3d 308, 335-37 (3d Cir. 2012); *Williams v. Brown*, 208 F. Supp. 3d 713, 716 (E.D. Va. 2016). The truth is probably less complicated.

2. *Weakland did not kill Hilda.*

The lynchpin of the State's case was Weakland's confession that he killed Hilda on Frank's behalf. But physical evidence and DNA evidence prove Weakland did not kill Hilda.

a. Weakland's testimony does not match the physical evidence.

Weakland testified that he killed Hilda by slitting her throat with a single cut; for good measure, he stuck the knife in her back afterward. SEOR 1522-23; *see also* SEOR 672-79. He denied stabbing Hilda's neck or strangling Hilda. SEOR 1574, 2504; *see also* SEOR 672-77. All he did was cut her throat. SEOR 2504.

That does not match up with the physical evidence. According to the State's coroner, someone first attempted to strangle Hilda. SEOR 2325-26. Next, the murderer slit Hilda's throat. SEOR 2320-21, 2324. Then, the assailant stabbed Hilda through the neck wound, at least once but probably multiple times, "with great force" and with real depth. SEOR 2322-24, 2326. As a coup-de-grace, the murderer stuck the knife in Hilda's back, although this wound was superficial. SEOR 2327.

Weakland's story of the murder is nothing like the coroner's account. He has consistently denied strangling Hilda or stabbing her in the neck; according to him, he only slit her throat. SEOR 672-79, 1574, 2504; EOR 8, 90-91, 164. There is only one rational way to explain this discrepancy: when Weakland "confessed" to the police, he did not have first-

hand knowledge of how Hilda died. (Neither, apparently, did the cops. SEOR 713-14.)

That is not the only problem with Weakland's account. For one, Weakland testified he did not get any blood on him, and he wasn't sure Hilda bled. SEOR 1574-75; EOR 122. Boutwell confirmed that Weakland didn't get any blood on him. SEOR 1980, 2046; EOR 3764; *see also* SEOR 2081. But there was blood all over the north bedroom. SEOR 1726-29; EOR 6095. If Weakland slit Hilda's throat and stabbed her neck, he would have gotten blood all over himself. But he was not bloody, which makes it highly unlikely he killed her. *See Souter v. Jones*, 395 F.3d 577, 596 (6th Cir. 2005).

The problems continue with the murder weapon. The police recovered a straight-edged butcher knife. SEOR 50; EOR 2472-74. But Weakland said he killed Hilda with a serrated bread knife. EOR 4, 2472-73; SEOR 1574, 2501-02. Once again, Weakland was wrong about the manner of death—suggesting he is also wrong about who killed her. *See Souter*, 395 F.3d at 590-97.

Similarly, the knife and its handle broke during the attack. Weakland said that happened when he stabbed Hilda's back. SEOR 1575-56;

EOR 164. But that wound was superficial. SEOR 2326-27. It is highly unlikely that this shallow impact broke the knife. It is much more likely that the knife broke as the murderer stabbed Hilda in her neck "with great force." SEOR 2322. Weakland is wrong on yet another count.

There are even more discrepancies. The police found Hilda gagged. SEOR 50. But Weakland switched his testimony about whether he gagged her (*compare* EOR 121-22; *with* SEOR 1576), and Boutwell told Webb he never saw Hilda gagged (EOR 282, 1776). There are similar issues regarding how Hilda was untied. Weakland testified he never untied her. SEOR 684. Marvin did not say he untied her. SEOR 724. But someone must have, because she was found untied. *Id.*

As this evidence shows, Weakland has no idea how Hilda died—because he did not kill her. Someone else did, so the State's theory is wrong.

b. The DNA evidence suggests someone else killed Hilda.

If this physical evidence were not enough, newly discovered DNA evidence points to the same conclusion: whoever killed Hilda, it was not Weakland.

In his latest round of state court litigation, Frank asked for DNA testing. The State tested hairs that were clenched in Hilda's hands, a blanket with a bloodstain from the southeast bedroom, and an electrical cord found next to Hilda's body.

The hairs were Hilda's. The only reason she would have her own hair clenched in her hands is if someone were trying to strangle her with something like a cord, and she grabbed at the cord at the back of her neck and tore her hair in the process. EOR 6432.

The State got a male DNA profile from the bloodstain in the southeast bedroom. This is probably Marvin's DNA, since Weakland pistol-whipped him in that bedroom and caused him to bleed. EOR 6437.

Finally, the State found another male DNA profile on the cord next to Hilda, which the killer probably used to strangle Hilda. This profile does not match Weakland or the profile that is probably Marvin's. EOR 6425 (citing EOR 6333-38), 6431. That suggests some unknown person strangled Hilda. Once again, this undercuts Weakland's claim that he (and no one else) personally killed Hilda. *See, e.g.*, *Davis v. Clark Cnty.*, 966 F. Supp. 2d 1106, 1121 (W.D. Wash. 2013).

Boutwell's accounts back up this theory. When he first heard about the crime, he was convinced Weakland had no opportunity to kill Hilda, since Boutwell was the last one to see her alive. SEOR 1992; EOR 282, 340, 3727-28. Boutwell originally told the police he and Weakland left the house at the same time, so Weakland could not have killed Hilda. EOR 1683. When Boutwell heard Hilda was dead, Weakland insisted he did not kill her, and that they were set up. SEOR 1989, 2050-51; EOR 3725, 3738. (Weakland was even more emphatic with his ex-wife Gail—one night, he got blackout drunk, began to cry, and repeatedly denied killing Hilda. SEOR 2368-69, 2383.) If Weakland could not have killed Hilda without Boutwell's knowledge, then another party must have been responsible.

This DNA evidence is significant for another, related reason. Weakland testified he brought a single accomplice (Boutwell) with him. But the police originally thought *three* suspects were at the scene. *E.g.*, SEOR 2461-62; EOR 4173, 4482. The DNA evidence backs that up, since it suggests an unknown individual strangled Hilda. If three people were present, there is yet another crucial flaw in Weakland's testimony.

All these signs point to one thing: Weakland is not the real killer. His account of the murder is fabricated, just like his accusations against Frank.

c. Weakland is an entirely incredible witness.

Anyone who thinks Frank is guilty would have to credit Weakland's testimony. No reasonable person could do that. Weakland is "the iconic incredible witness" (Dkt. No. 14 at 25), and his attempts to blame Frank cannot be trusted.

Weakland has constantly changed his story. When the police approached him before his arrest, he refused to inculpate anyone other than himself. SEOR 1915-16. But in the middle of his preliminary hearing, he decided to turn State's witness. Part of the reason was to save himself, and part of it was to help his family—some of them could have been charged as accessories after the fact, and some of them had unrelated charges pending. Weakland hoped that if he took the heat, he could get his family out of trouble. *See, e.g.*, EOR 152, 213-17, 255-56, 1381, 1920-29, 2054-60, 3749-50, 4060, 4187-92, 4526-27. To that end, he would've told the cops "whatever [they] want[ed]." EOR 147; *see also* EOR 1381.

Once Weakland decided to talk, his attorney Michael Cherry convinced the State to accept an incredible deal: if Weakland cooperated, he could plead guilty to second-degree murder and get a sentence of five years to life. Cherry told Weakland that he would have to give up some names, and Cherry had seen in the discovery materials that the cops were interested in Frank and Rosalie. EOR 5046. Weakland took the deal. He gave a statement and incriminated Frank and Rosalie.

Weakland testified along those lines at the preliminary hearing. But he recanted that testimony at Rosalie's trial and Frank's first trial. EOR 1381, 3578-80. That recantation meant the State could have pulled the plea deal and pursued the death penalty against him. EOR 1401-02, 2005. He recanted anyway.

After those trials, the State started putting the screws to Weakland. The prison placed him in a much harsher security level. EOR 3587, 4983. The State charged him with perjury; he ultimately entered an *Alford* plea and received probation. SEOR 51. Most importantly, the State started a campaign to deny Weakland parole.

In the face of those pressures, Weakland agreed to a new deal: he would un-recant and testify against Frank if the State stopped writing poison pen letters to the parole board. *See infra* at 62-64.

To summarize, Weakland originally cut a deal and named Frank to help himself and his family. He then went out on a limb and recanted, potentially exposing himself to the death penalty. But when the State took steps to deny him parole, he decided to cooperate again. With that background, his accusations against Frank at the second trial are both unsurprising and incredible.

There is a laundry list of other reasons to doubt Weakland. During Frank's preliminary hearing, the court thought Weakland's credibility was "minimal." EOR 257. Weakland originally made statements against Frank in connection with the Obenauer incident, but Frank had five alibi witnesses. *See supra* at 13. (The Nevada Supreme Court tossed that conviction.) Meanwhile, Weakland was a man of terrible moral character. He committed countless violent acts over the years: for example, right after the murder, he beat his ex-wife Gail so badly that she ended up in the hospital, and he almost strangled Gail's child. *See* EOR 315-21, 5029; SEOR 1553-56, 2366, 2383-84, 2567.

Simply put, the "ever-shifting" testimony of someone like Weakland cannot serve as the basis for Frank's conviction. *Nickerson v. Roe*, 260 F. Supp. 2d 875, 896 (N.D. Cal. 2003).

3. *Frank is not a plausible suspect, but the following people are.*

Over forty years have passed since Hilda's death, and we may never know for sure who orchestrated her murder. But the following suspects are likely candidates. *See Munchinski*, 694 F.3d at 336-37 (citing *House*, 547 U.S. at 548-53).

a. Joey Costanza.

Weakland's friend Joey Costanza, a/k/a Joey Starr, is a prime suspect. Costanza and his family were prolific criminals. EOR 5540-43. (Costanza was also an informer to the local police.) Given his ties to the mob and the Krause incident, he was probably involved.

Costanza and Weakland knew each other through Costanza's loan-sharking business. A loan shark like Costanza "loans money at high interest; and if he isn't paid, he appears and tries to collect it by force." EOR 5440. *See generally* EOR 5519-77. Costanza supplied the money; Weakland supplied the force. EOR 5439-43. The connection between the

two ran deep: Weakland called Costanza his "honor brother." EOR 2161; SEOR 2366, 2385-86.

As early as the first week in December 1973, Weakland approached Costanza about a job that was almost certainly the Krause incident. *See infra* at 67-68. Costanza knew minute details about the crime well before Weakland said he knew those details. He even knew details that Marvin didn't know. EOR 5592-93; SEOR 2461-62. Costanza's thorough knowledge suggests Weakland was not just soliciting his help—they were planning the crime together.

During the incident, Weakland stole an expensive watch from Marvin. He said Frank and Rosalie asked him to take it, but he ultimately gave it to Costanza. SEOR 1540-41. Perhaps Costanza, not Frank, was the one who asked Weakland to grab the watch.

The afternoon after the murder, Weakland met with Boutwell and Webb at a restaurant and signaled that Costanza was involved. Weakland told Boutwell and Webb not to talk to anyone about the crime "until you hear from Joey Starr." EOR 1640; SEOR 1994-95. At some point, Costanza showed up, and Weakland went to talk with him. Boutwell and Webb were nervous about Costanza seeing the three of them together.

Weakland said not to worry; the two could trust Costanza because he "knows what's going on" and was Weakland's "lawyer." EOR 1781; SEOR 2113-14. Weakland continued to spend time with Costanza and his brother Nick that day after leaving the restaurant. EOR 175.

According to Boutwell, Costanza was the only name Weakland ever mentioned to him. SEOR 2052-53. At Frank's retrial, Boutwell testified he got the feeling Costanza may have hired Weakland to kill Hilda. SEOR 1687.

In the days that followed, Weakland had repeated contacts—"every day almost"—with Costanza. EOR 5441. A few days after the murder, Weakland noticed the cops tailing him; he drove to Nick's restaurant. EOR 5594-95. That is a sure sign that the Costanzas had their hands in the Krause incident.

Nick's involvement is significant for another reason. Nick was connected to Tony Spilotro, the notorious enforcer for the Chicago Mafia syndicate. EOR 5225[4], 5550. Spilotro ran organized crime in Las Vegas during the 1970s and headed a notorious burglary ring known as the

[4] The Court should take judicial notice of this article. *See supra* n.2.

"Hole in the Wall" gang. *See Valley Broadcasting Co. v. U.S. Dist. Court for Dist. Of Nevada*, 798 F.2d 1289, 1290 (9th Cir. 1986). The Costanzas were linked to that gang. EOR 5797. As the most prominent street-level criminal in Las Vegas, it is hard to believe Spilotro would allow anyone to conduct a flagrant contract killing and robbery involving a high-ranking casino executive without his knowledge. *See* Dennis N. Griffin, The Battle for Las Vegas at 51-52 (2006) (hereinafter "Battle"). Whoever planned Hilda's death would have needed Spilotro's approval, and the Costanzas could have arranged that.

Given the Spilotro connection, Joey Costanza's behavior throughout the 1980s is all the more suspicious. In the marathon meeting between Lee and Costanza in New Jersey, Costanza expressed fear about returning to Nevada to testify. Costanza clarified he was not afraid of Frank. SEOR 810-11, 820-23. Perhaps he was afraid of a more dangerous member of the conspiracy.

Finally, Nick Costanza was not just connected to the mob: he also knew Roy Woofter, the District Attorney, and Beecher Avants, the head of homicide at the local police. EOR 5779; SEOR 2468-69. In March 1974, Avants took the unusual step of asking a police officer not to book

a Costanza family member (Jerry). EOR 5536-37. At the same time, Avants was aware that the Costanzas had learned non-public information about the Krause investigation. EOR 5539. In short, the Costanzas had a strong relationship with local law enforcement.

Costanza's name is all over the Krause incident, and he must have been involved to some degree. If anyone orchestrated this plot, he is a likely guess.

b. Marvin Krause.

Although the DNA evidence suggests Marvin did not strangle Hilda, *see* Section II(B)(2)(b), *supra*, there are plenty of reasons to believe Marvin had something to do with Hilda's death.

Unlike Frank, Marvin had a direct financial motive to murder Hilda. Hilda owned most of the couple's fortune, but she was considering divorcing Marvin, which would hurt his finances. SEOR 2199. Meanwhile, Marvin was in close proximity to Hilda when she died (although he maintained he was passed out from a head wound at the time).

Marvin made suspicious statements regarding the crime. He originally described the assailants as Mexicans who wore Eisenhower jackets. SEOR 1627-28. Weakland and Boutwell are not Mexican, and they

were not wearing Eisenhower jackets. EOR 1689; SEOR 1957-58, 2014, 2078, 2348. Meanwhile, Marvin said he had a money clip with $1,600 in his pocket that morning. According to him, he dropped the clip as the perpetrators marched him upstairs. SEOR 2244-45. After the assailants left, the money clip was supposedly still there. SEOR 2255. That is improbable—surely one or both of the assailants would have noticed Marvin dropping $1,600 on the ground. Finally, after Weakland knocked Marvin out and Marvin came to, he made little effort to aid his wife, who was supposedly dead or dying. Instead, he simply called the police and went downstairs. SEOR 2253-54; *see also* SEOR 721. All of this is highly unusual.

Boutwell seemed to think at one point that Marvin was in on the scheme. Marvin did not seem terribly surprised when the assailants entered the garage. SEOR 2029. Boutwell was not sure whether Weakland made a real effort to tie Marvin up. SEOR 2034; EOR 1688. All this made Boutwell wonder whether Marvin knew the plan all along. SEOR 2029; EOR 1668, 3775-76. And it wasn't just Boutwell—Weakland told multiple people that Marvin, not Frank, had planned Hilda's murder. SEOR 2537-38, 2542; *supra* at 18, 24; *cf.* EOR 4526.

Marvin's role as a Caesars executive is also notable. Marvin ran the slot machines, and he was always on time for the slot "drops." SEOR 1748-50. If the Mafia was skimming from the casino's proceeds, he would've likely been in the periphery. *See* Battle at 35, 177-78. Additionally, at least two other Caesars executives were victims of violent crimes during the relevant time period. EOR 1.[5] And the Krauses had mob connections—they previously ran a casino in Havana and were original minority owners of Caesars. *See* Robert Dickey, Greyhound to Vegas at 147-74 (2010). Perhaps Hilda's death stemmed from something besides a love triangle.

Finally—and perhaps most significantly—Weakland originally named Marvin as the person who put him up to the crime. Justice Gunderson made two statements on the record to that effect. *See supra* at 18, 24; EOR 5631-32, 6276-79. His account gives all the more reason to believe Marvin planned the attack.

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[5] The Court should take judicial notice of this article. *See supra* n.2.

c. Rosalie acting alone.

A jury acquitted Rosalie. EOR 3306. That is a substantial reason to believe Frank is innocent; the plot could not work without Rosalie's involvement. However, the converse is not true. Rosalie could well have planned to kill Hilda (and marry Marvin) without Frank's knowledge. While that would still be implausible, it is at least more plausible than the State's theory. *See* SEOR 886-87.

d. Weakland acting alone.

The evidence is overwhelming that Weakland did not kill Hilda. But if the Court is unpersuaded, then there is a simple potential explanation for Hilda's death: Weakland acted alone and killed Hilda, not because he was a paid assassin but because the robbery went south.

It appears Weakland actually intended to rob the Krauses. If that wasn't part of the plan, he would've waited until Marvin left before breaking into the house. After the incident, he repeatedly vented about Marvin having no money on him. *E.g.*, SEOR 1986. And during the incident, he told Hilda he would kill Marvin if she didn't tell him where the money was. EOR 1629. Perhaps Weakland followed through on that threat, except he targeted Hilda instead of Marvin.

* * *

It may be impossible to prove these theories at this late date. But what can be proven is that Frank had nothing to do with the murder. The hard evidence leads to one conclusion: Weakland did not kill Hilda, so Frank cannot be guilty of hiring Weakland to kill Hilda.

C. The State Court's Purported Evidence of Frank's Guilt is Threadbare.

The Nevada Supreme Court rejected Frank's innocence claim in its 1998 opinion. SEOR 49-58. In doing so, it found "there was overwhelming evidence" of Frank's guilt. SEOR 56. That is a wild overstatement. The state court's analysis is unreasonable and unconvincing, and this Court should not defer to it.

As a threshold matter, Section 2254(d) should not apply to a *Herrera* claim. *See, e.g.*, *Davis*, 130 S.Ct. at 1-2 (Stevens, J., concurring); *Triestman v. United States*, 124 F.3d 361, 377-80 (2d Cir. 1997). Either way, it does not bar relief here. The Nevada Supreme Court made unreasonable factual statements at each step of its analysis. This Court does not owe its opinion any deference (*see* 28 U.S.C. § 2254(d)(2); *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004)) and can review this claim de novo (*see Maxwell v. Roe*, 628 F.3d 486, 494-95 (9th Cir. 2010)).

First, the Nevada Supreme Court said "Weakland never named anyone other than LaPena as the person who hired him to kill Mrs. Krause." SEOR 56. That is misleading. Weakland originally told the police *Marvin* hired him to kill Hilda. *See supra* at 18, 24. And Weakland testified twice that Frank did *not* hire him to kill Hilda. SEOR 1577-78; EOR 1381, 3578-80. In any event, Weakland's testimony about the crime is demonstrably false in multiple respects and entirely unbelievable. *See* Section II(B)(2)(c), *supra*. Nothing Weakland has ever said should lead any reasonable person to believe Frank is guilty.

Second, the court found that "Webb testified at the 1989 trial that Weakland had told him that LaPena and Maxwell had hired him to kill Mrs. Krause." SEOR 56. That is another unreasonable and misleading statement. Webb conveyed statements from Weakland that might *imply* Frank's involvement (*see* SEOR 2090), but there is only one piece of Webb's testimony that mentions Frank by name. It involved an incident in February 1974, when Webb and his girlfriend ran into Weakland at a 7-Eleven store. According to Webb, Weakland pulled him aside and told him that if the cops picked him up, "don't remember Frank LaPena. He is involved in this one." SEOR 2095. That is not the same as "Weakland

[telling] him that LaPena and Maxwell had hired him to kill Mrs. Krause," and the court stretched his testimony when it stated otherwise.

That story is implausible anyway. Webb had not heard Frank's name in connection with the Krause incident before that 7-Eleven meeting. SEOR 2115-16. If Weakland did not want Webb to name Frank, he would not have mentioned Frank's name in the first place.

Webb's testimony in the Obenauer trial provides additional reason to discount the 7-Eleven narrative. The prosecution introduced the same testimony in the Obenauer case to suggest that Frank hired Weakland and Webb to assault Obenauer. EOR 4934-35. The State improperly tried to have it both ways by suggesting the 7-Eleven story applied to both crimes. In addition, the Obenauer trial illustrates Webb's credibility problems. Webb said he and Weakland met with Frank the night before the assault. EOR 4915-20. But Frank had an alibi for that time period: he was at a party at his house the whole evening. *See supra* at 13. Webb appears to have lied on the stand when he said he met with Frank that night, and he likely lied on the stand during the Krause trial, too.

Webb had every incentive to lie in both trials. He could have been liable for aiding and abetting Hilda's murder, and he could have been

liable for the Obenauer assault, too. But he resolved all this exposure by pleading guilty to a single gross misdemeanor, for which he received probation. SEOR 2124; EOR 4936-37. As with Weakland, a deal that good would motivate Webb to say whatever the police wanted to hear. *Cf.* SEOR 2109. All told, Webb's testimony is worth little. *See House*, 547 U.S. at 552 (stating that "incriminating testimony from inmates [and other] suspects" has comparatively low "probative value").

Third, the Nevada Supreme Court said "Weakland's accomplice, Boutwell, also testified that LaPena had orchestrated the plan to kill Mrs. Krause." SEOR 56. Boutwell said nothing of the sort. Rather, he testified that Weakland never named anyone besides Joey Costanza. SEOR 2052-53. No court could "reasonably conclude that" this assertion from the Nevada Supreme Court "is supported by the record." *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir. 2014).

Fourth, the court described how Bill Fish (Frank's cellmate) testified that Frank confessed to him. SEOR 56-57. But at the preliminary hearing, the court found Fish to be incredible and "reject[ed] Fish's entire testimony." EOR 1200. Perhaps that is because he was working with the police when he elicited the supposed confessions. SEOR 2139-42. Or

perhaps that is because his strategy—befriending a high-profile defendant whose case is getting heavy newspaper coverage, and turning to the police to try and leverage a deal out of a supposed "confession"—is a time-dishonored tactic. *See House*, 547 U.S. at 552; *Maxwell*, 628 F.3d at 502; *see also, e.g.*, *Lisker v. Knowles*, 463 F. Supp. 2d 1008, 1026 (C.D. Cal. 2006); SEOR 2157-62; *cf.* EOR 4454-55. Either way, his testimony adds nothing.

Fifth, the court relied on testimony from Beecher Avants, the head of homicide at the local police. According to Avants, Frank was nervous and emotionally upset when Avants spoke to him after the murder. SEOR 57. That is hardly a probative point.

Sixth, the court noted that Weakland called Frank's house from Lake Havasu a day or two after the murder. SEOR 57. That was probably because Frank's roommate, Lou Cardinale, had arranged for Weakland to go to Lake Havasu to spy on a friend's wife. SEOR 866, 1039-41, 2474-75. The call from Weakland to Cardinale has nothing to do with Frank.

Seventh, in the context of Frank's direct appeal, the court described Weakland's ex-wife Gail's testimony regarding visits she had with Frank.

See infra at 60-61. There is no evidence those visits had any connection to the Krause incident.

To start, Gail said Weakland visited Frank before the murder. She does not know what they talked about, so that visit proves little.

Next, Gail testified that after the murder she returned a pair of lead-lined boxing gloves to Frank. The State thought Frank gave Weakland those gloves to use during the Krause crime. But the prosecution inconsistently argued that the gloves were for the Obenauer incident (EOR 160-61, 4835), which dulls any probative force this evidence might have.

Gail also said Frank gave her $50 after the murder. Frank did that because a man named Bill Underwood promised to lend Weakland $450 but mistakenly cut a check for $400; Frank made up the rest. EOR 417-20, 1732, 4435-36. If anything is suspicious about those transactions, it is Underwood's $400 loan, not Frank making up the missing $50.

In addition, Gail had substantial credibility problems, making her testimony even more suspect. *E.g.*, SEOR 2374 (describing her fear of Weakland); 2375 (describing how Chuck Lee got her Rosalie's old job at

Caesars); 2378 (describing her problems with alcohol); EOR 2173-75 (describing leniency on DUI charges).

Finally, the state court's analysis omits or gives short shrift to substantial exculpatory arguments—for example, the fact that Weakland did not know how Hilda died. *See* Section II(B)(2), *supra*. The court "overlooked or ignored" all manner of "highly probative" evidence, so its opinion is unreasonable on that front as well. *See Taylor*, 366 F.3d at 1001.

The Nevada Supreme Court's opinion purports to find "overwhelming" evidence against Frank, but the evidence it cites is either non-existent, unreliable, or irrelevant. Its factual findings are unreasonable, and its conclusion cannot withstand even the highest amount of deference. (For its part, the federal district court's opinion below simply parrots the state court's findings, so its opinion adds little to the discussion.)

D. Frank Has Continually Fought To Prove His Innocence.

A few words about Frank are in order. After the Nevada Supreme Court overturned his original conviction, the State offered him a plea deal for time served. Frank rejected that offer. SEOR 485. He has always maintained his innocence; he testified during the 1996 evidentiary hearing that he was innocent, and the state court found him credible. SEOR

418. After the post-conviction court granted his petition, he made bail and moved near Mexico. When the Nevada Supreme Court reversed the lower court, he did not slip across the border; he went straight back to Las Vegas and turned himself in. EOR 6244.

Now, Frank is nearly 80 years old. Perhaps other men his age would put the past behind them and live out their golden years in peace. But Frank is still trying to clear his name. There is only one way to explain his behavior: he is innocent. The Court should grant the writ and order Frank's indictment dismissed.

III. THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO CONVICT FRANK OF MURDER AND ROBBERY.

As the previous section explains, a review of all the relevant evidence in the state court record shows that Frank is innocent. In the same way, a review of Frank's second trial shows that the evidence was insufficient for a conviction.

Due process requires that the State present enough evidence to "reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In evaluating sufficiency claims, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt." *Id.* If no rational trier of fact could have found the defendant guilty, a conviction cannot stand.

The State presented insufficient evidence at Frank's second trial. First, Weakland testified that he slit Hilda's throat and did *not* strangle her or stab her in the neck. SEOR 1522-23, 1574, 2504. But whoever killed Hilda strangled her and stabbed her in the neck. SEOR 2320-27. Thus, while Weakland testified that he killed Hilda, he apparently did not inflict two of the three fatal injuries. The only rational explanation is that he did not know how Hilda died. Even in the light most favorable to the prosecution, the only conclusion is that Weakland did not kill Hilda. *See* Section II(B)(2), *supra*.

The Nevada Supreme Court denied this claim on direct appeal. SEOR 61-62. But it did not address this point. Its opinion completely "overlooked or ignored" this "highly probative" argument regarding Frank's innocence. *See Taylor*, 366 F.3d at 1001. As a result, its decision involved an unreasonable determination of fact under 28 U.S.C. § 2254(d)(2) (*see Taylor*, 366 F.3d at 1001), and it was an unreasonable application of *Jackson* under Section 2254(d)(1) to boot.

Second, under Nevada law, a jury cannot convict a defendant solely on the basis of accomplice testimony; the State must also admit "evidence from other sources" that "tend[s] on the whole to connect the accused with the crime charged." SEOR 61 (citing *LaPena v. Sheriff*, 91 Nev. 692, 696, 541 P.2d 907, 910 (1975)). The State did not do that here. Weakland, Webb, and Boutwell were all accomplices to the Krause incident. Taking out their testimony, there is insufficient additional evidence to link Frank to the crime.

The Nevada Supreme Court listed two supposed pieces of inculpatory non-accomplice testimony. The court cited a series of visits that Weakland's ex-wife Gail said she had with Frank. SEOR 61. It also described testimony that Frank was "apprehensive" when he spoke to the police about the crime. *Id.* According to the court, this testimony was enough to validate the accomplices' accusations.

This analysis was unreasonable. Nevada law requires that the non-accomplice testimony actually link the defendant to the crime. This supposed evidence does no such thing. *See supra* at 55-56. In short, the court did not cite any independent testimony that actually suggests Frank hired Weakland to kill Hilda—because there is none. Its contrary

decision was therefore an unreasonable application of *Jackson*, because it did not cite any evidence that can reasonably be viewed to satisfy this element. The decision was an unreasonable determination of the facts for the same reason. (Again, the federal district court's opinion simply repeated the Nevada Supreme Court's findings, so its opinion contributes little.) The Court should grant the writ and order Frank's indictment dismissed.

IV. FRANK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Frank's trial attorneys performed ineffectively for at least two reasons. They did not tell the jury why Weakland was testifying against Frank: if he didn't, there was a good chance he would never get parole. In addition, the attorneys failed to arrange for Costanza to testify. Costanza's testimony would have gone a long way toward further impeaching Weakland. For both reasons, Frank received ineffective assistance at trial, and his Sixth Amendment rights were violated.

A criminal defendant has the right under the Sixth Amendment to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). When analyzing ineffective assistance of counsel claims, courts address two issues. "First, the defendant must show that counsel's

performance was deficient" (*Strickland*, 466 U.S. at 687), i.e., that the lawyer's performance fell "below an objective standard of reasonableness" (*Hill v. Lockhart*, 474 U.S. 52, 57 (1985)). Second, the defendant must show that the deficient performance resulted in "prejudice," i.e., "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687, 694. Frank can make both showings with respect to both errors. (Once more, the federal district court's reasoning on this point is cursory, so it adds little to the analysis.)

A. Frank's Attorneys Failed to Explain to the Jury Why Weakland Switched His Testimony Again to Accuse Frank.

During the second trial, the jury learned that Weakland had previously recanted his testimony against Frank. SEOR 1577-78. But the jury never found out why Weakland switched back. Frank's attorneys were ineffective for failing to answer that crucial question. *See* SEOR 417.

Weakland changed his story again because he entered into a deal with the State. Specifically, he agreed to testify against Frank if the State stopped writing poison pen letters to the parole board. EOR 5252.

It is easy to see why Weakland made that deal: the letters were devastating, and Weakland was unlikely to ever see the light of day if the State kept sending them.

Detective Avants wrote one such letter. Avants described Hilda's murder and Weakland's violent and depraved nature in great detail. The letter concluded, "a person of this background should not be considered for parole. . . . There is no room in society for the kind of behavior that this man exhibits. We feel strongly and we urge that the Parole Board deny Gerald Weakland's application for parole." EOR 5218. Avants sent a similar letter two years later. He argued that "Weakland does not deserve any leniency whatsoever," and he wrote, "I hope and pray that Weakland will be denied parole at his hearing." EOR 5227.

Harmon (the prosecutor) weighed in, too. He called Weakland "really the lowest kind of human being" and "among the most dangerous type of persons who can be at large in a community or a state." EOR 5222. Harmon explained that the DA's office "opposes [Weakland's] parole . . . at any time in the foreseeable future." *Id.*

Another prosecutor, Donald Wadsworth, wrote a similar letter a couple years later. Wadsworth reaffirmed Harmon's letter, in which Harmon "strongly recommended that this inmate be made to serve a substantial period in prison before he is seriously considered for parole release." EOR 5229.

At the same time, the chairman of Nevada's parole commission said publicly that "it would be favorable [to Weakland] if he came back and testified" against Frank. SEOR 652-53; *see also* EOR 5516.

After Weakland struck the deal and testified to the grand jury, the State changed its tune. The DA told the parole board that Weakland was "fully cooperative" and "testifying truthfully"; he asked the board to "consider Mr. Weakland's cooperation in its subsequent proceedings." EOR 5253.

Counsel performed deficiently by failing to tell the jury about these letters, and the mistake was highly prejudicial. The lead trial attorney, Lamond Mills, testified that he would have been aware of the deal and had no explanation for why he didn't use it at trial. SEOR 417, 553-55, 577. As that testimony confirms, counsel did not make a strategic decision to pull this punch; they simply missed the argument. Nor could

there be any strategic reason to hold back. Weakland was the key to the State's case, and his motive for un-recanting was a critical question. If counsel could show that Weakland had a self-serving reason to switch his testimony back, it would go a long way toward helping Frank's case. *See Cleveland v. Bradshaw*, 693 F.3d 626, 636 (6th Cir. 2012). The defense's failure to explain that motive allowed the jury to infer that Weakland was un-recanting for honest reasons.

The Nevada Supreme Court unreasonably rejected this claim. According to the court, defense counsel "substantially impeached" Weakland at trial, so counsel was reasonably effective. SEOR 52. Specifically, counsel elicited details about Weakland's first plea deal to second-degree murder, his recantation at Frank's first trial, and his perjury conviction, among other things. SEOR 52-53. Thus, the court thought, it was okay that counsel failed to elicit evidence of this new deal.

That analysis is contrary to and an unreasonable application of *Strickland*. The analysis under *Strickland* does not turn on whether counsel made *any* efforts to impeach the State's star witness. Instead, *Strickland* requires evaluating whether a specific alleged act or omission was a "serious" "error[]" (466 U.S. at 668), or whether it had a legitimate

"strategic" justification (*id.* at 690). Here, the state court did not analyze whether the failure to introduce evidence of Weakland's second deal was a serious error in its own right. Instead, it unreasonably limited itself to the question whether counsel took other steps to attack Weakland.

Even when taking the "doubly deferential" combination of *Strickland* and Section 2254(d) into account, *see Cullen v. Pinholster*, 563 U.S. 170, 190 (2011), the only reasonable view is that Frank's attorneys performed deficiently by failing to introduce this evidence. Mills testified during the state court evidentiary hearing that he should have told the jury about the second deal. SEOR 553-55, 577. There is no legitimate reason to have skipped that point, and all the reason in the world to tell the jury why Weakland un-recanted. Counsel's other efforts to impeach Weakland cannot justify their failure to answer that central question—one of the single most important issues at trial.

The state court's decision was also an unreasonable determination of the facts. Read generously, the court appears to have reasoned that any evidence regarding Weakland's second deal would be cumulative. But it was not cumulative—it cast Weakland's testimony in an entirely different light by providing an unflattering explanation for why he was

once again incriminating Frank. *Cf. Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1353 (11th Cir. 2011).

The Nevada Supreme Court did not reach the question of whether counsel's omission prejudiced Frank. Thus, the Court can review this issue *de novo*. *See Wiggins v. Smith*, 530 U.S. 510, 534 (2003). It is reasonably probable that evidence of Weakland's second deal would have produced an acquittal. It is no answer to say the jury knew other information that impeached Weakland: if the jury learned the specific reason why Weakland was again changing his tune, it would have had all the more occasion to doubt his most recent about-face. *See Carriger*, 132 F.3d at 481; *Wilkerson v. Cain*, 233 F.3d 886, 891-92 (5th Cir. 2000). Frank's Sixth Amendment rights were therefore violated.

B. Frank's Attorneys Failed to Secure the Testimony of Joey Costanza, a Crucial Defense Witness

Costanza was a key witness in Frank's case, but the defense failed to make sure he testified at trial. That unprofessional mistake probably changed the outcome at trial, and Frank is entitled to relief as a result.

1. *Costanza had crucial information to tell the jury.*

Costanza had important information that bore on Weakland's credibility. In December 1973, about six weeks before Hilda was killed,

Weakland spoke to Costanza about a proposed crime that sounded a lot like the Krause robbery. Weakland told Costanza he had been asked to assault a husband and wife; the wife would receive a severe beating, and the husband would receive a moderate beating, just enough to make it look like he was intentionally attacked. Weakland explained where the husband and wife lived and said he would have to climb over a wall to get to their house. The husband left early for work (around 4:30 a.m.) two days each week, which is when the crime would take place. EOR 5592-93.

After Costanza learned about Hilda's murder, he realized it was probably the same crime. Both involved assaulting a husband and wife, with the wife getting more seriously injured; the Krauses lived in a gated community, so the assailants had to climb a wall; and the attack took place early in the morning. Costanza already had a relationship with Detective Whitney, and he spoke with Whitney on January 16 and 18, 1974, to share this information. *Id.*

Costanza mentioned Weakland's name specifically, and he said two other people were involved. One was a man named Tom, who was a former football player. His description of Tom matches Boutwell. Costanza

also mentioned another man, whose description matches Webb. Costanza said three people had committed the crime; that tidbit matched the physical evidence. *Id.*

This information seriously contradicted Weakland's account. While Weakland said Frank approached him in general terms about the crime at some point in December 1973, the key meeting between Frank, Rosalie, and Weakland supposedly took place on January 2 or 4, 1974. According to Weakland, it was not until this meeting that he learned precisely where the Krauses lived, and that the crime should take place early on a Monday or Friday. SEOR 1504-09, 2496-97. But according to Costanza, Weakland knew this information *six weeks* before the murder, which would be about December 3, 1973. Weakland admitted he had told Costanza about the crime in December 1973, and that what Costanza told Whitney was an accurate description of their conversation. EOR 5440-41; SEOR 636. In that case, Weakland was lying about the substance of his discussions with Frank and Rosalie, plain and simple.

After Costanza contacted Detective Whitney, Whitney passed along the information to his colleagues, including Avants. Whitney refused to

tell Avants whom the informant was, but Whitney arranged for the informant to call Avants. On this call, Costanza gave little additional information, but he did confirm that he had not heard Frank's name mentioned in connection with the crime. SEOR 2462-67.

2. *The failure to arrange for Costanza's testimony at trial violated Frank's Sixth Amendment rights.*

Counsel was ineffective for failing to procure Costanza's appearance at trial. Specifically, counsel did not pursue the best means for ensuring Costanza's attendance at trial, namely the Uniform Act. The prosecutor and the court repeatedly told counsel to use the Uniform Act. And the court repeatedly gave the defense a certificate of materiality, the first step under the Act. However, counsel did not continue the process. *See supra* at 18-21. To the contrary, counsel believed that New Jersey did not have a reciprocal statute. SEOR 915. That is inaccurate: both New Jersey and Florida, the two states where Costanza lived, had a reciprocal statute at the time. *See* N.J.S.A. § 2A-81-18 et seq.; F.S.A. § 942.01-942.06.

This deficient performance prejudiced Frank. As the Nevada Supreme Court stated on multiple occasions, Costanza's testimony was crit-

ical to the defense. SEOR 1438-39, 1441; *see also* EOR 5714-16. Costanza would have impeached Weakland's testimony in numerous ways, such as when Weakland learned the plan, who provided him information about Marvin, what the main goal of the crime was (a robbery), and whether Weakland ever mentioned Frank's name to Costanza.

Costanza's testimony would not only impeach Weakland; it would also exonerate Frank. The timing of the conversation between Weakland and Costanza suggests Frank was not involved in the crime. Furthermore, substantial evidence links Costanza to the crime. *See* Section II(B)(3)(a), *supra*. The defense could have used Costanza's testimony to rebut the idea that Frank was involved and create a reasonable doubt about whether Costanza was the real mastermind.

The state court's decision was unreasonable with respect to both the facts and the law. The court inappropriately speculated that counsel's failure to use the Uniform Act was a strategic delay tactic. SEOR 55. There is no evidence to support that conclusion. *See Hurles*, 752 F.3d at 778. To the contrary, counsel made multiple attempts to obtain Costanza's testimony. *See supra* at 17-21. In fact, Costanza sent a letter

complaining about these efforts. EOR 5652-53. The problem is that counsel inexplicably did not follow the proper procedure under the Act.

The court also unjustifiably concluded that there was no prejudice. That finding contradicted its own prior decisions, in which the court "expressly recognized the manifest significance of [Costanza's] testimony." SEOR 1441. The court was also wrong that the jury heard all of the relevant information about Costanza. According to former defense counsel Gowen, Costanza had more to tell. Gowen testified about a conversation he had with Costanza in which Costanza revealed, among other things, that (1) Weakland learned information about Marvin from an employee at Caesars, (2) Weakland had two other people in the fold and was searching for a lookout, and (3) Weakland's true aim was to rob Marvin. SEOR 910-12, 947-49. The jury did not hear this information, which would have helped impeach Weakland, exonerate Frank, and establish Costanza as an alternative suspect. To the extent that Gowen failed to pass that information on to Carter and Mills, and to the extent that this failure affects the instant claim, then Gowen was ineffective along with Carter and Mills.

Costanza was an essential witness, and the defense failed in its attempts to get him to trial. Reasonably effective defense counsel would have used the Uniform Act, which would have ensured that Costanza showed up. *See Alcala v. Woodford*, 334 F.3d 862, 872 (9th Cir. 2003). The jury missed out on key information as a result of the mistake. Thus, Frank did not receive effective assistance at trial.

V. THE DISTRICT COURT WRONGLY HELD THAT FRANK'S CROSS-EXAMINATION CLAIM WAS UNEXHAUSTED.

Frank originally raised a claim that the trial court impermissibly restricted the defense's cross-examination of Weakland, which violated his Sixth Amendment confrontation rights. The lower court held that this claim was unexhausted. That was incorrect.

A federal court will not grant a state prisoner's petition for relief until the prisoner has exhausted his available state remedies for each claim. *See Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b)(1)(A). "Exhaustion occurs when the petitioner has given the state courts a full and fair opportunity to consider and resolve the federal claims." *Sandgathe v. Maass*, 314 F.3d 371, 376 (9th Cir. 2002) (citing *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)).

Frank fairly presented this issue to the state courts as a federal constitutional claim. In his opening brief, Frank specifically stated that the restriction on his cross-examination of Weakland "violated the defendant's constitutional right of confrontation." SEOR 1491. That is a clear assertion of a federal constitutional right, particularly because the Nevada constitution does not have an analogous guarantee.

Moreover, Frank relied on a state court decision in his reply brief (*Crew v. State*, 100 Nev. 38, 45, 675 P.2d 986, 991 (1984)) (SEOR 1352) that alerted the state court to the federal nature of this claim. The portion of *Crew* that counsel pin-cited explains that a court must allow "sufficient cross-examination . . . to satisfy the sixth amendment" and referred to various federal cases, including *Davis v. Alaska*, 415 U.S. 308 (1974). By citing *Crew*, Frank apprised the state court of the federal constitutional nature of the claim. *See Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

Because the district court incorrectly dismissed this claim, this Court should remand the case so that the lower court can consider it in the first instance. *See Merritt v. Countrywide Fin. Corp.*, 759 F.3d 1023, 1034 (9th Cir. 2014). If the Court agrees, it should authorize a general

remand, so that counsel may litigate any additional claims for relief that Frank may have.

CONCLUSION

This Court should reverse the lower court's decision and remand with instructions to grant Frank a writ of habeas corpus. At the very least, the Court should order a general remand.

STATEMENT OF RELATED CASES

Counsel is unaware of any related cases currently pending before the Court.

CERTIFICATE OF COMPLIANCE

This brief complies with the longer length limit of 15,000 words authorized by the Court's October 31, 2017, order. The brief is 14,353 words, excluding the portions exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word and Century 14-point font.

Dated this 9th day of November, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

FRANK RALPH LAPENA, Petitioner-Appellant, vs. GEORGE GRIGAS and ADAM PAUL LAXALT, et al., Respondents/Appellees.	CA No. 15-16154 D.C. No. 2:00-cv-0960-RFB-NJK

I hereby certify that on November 9, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants.

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Federal Public Defender

ADDENDUM

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF CONTENTS

U.S. Const. amend. V A-1

U.S. Const. amend. VI A-1

U.S. Const. amend. VIII A-1

U.S. Const. amend. XIV A-2

28 U.S.C. § 2254(d) A-2

The Fifth Amendment to the United States Constitution provides in part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section One of the Fourteenth Amendment to the United State Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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.

APP. 094

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FRANK RALPH LaPENA,

Petitioner,

vs.

GEORGE GRIGAS, *et al.*,[1]

Respondents.

_____/

2:00-cv-00960-RFB-NJK

ORDER

Introduction

This action is a petition for a writ of habeas corpus by Frank Ralph LaPena, who in 1989 was convicted, after a second trial, of first degree murder and robbery with the use of a deadly weapon. The case is before the court with respect to the merits of the claims remaining in LaPena's habeas corpus petition. The court denies LaPena's habeas petition, denies LaPena a certificate of appealability, and directs the clerk of the court to enter judgment accordingly.

[1] On March 26, 2015, respondents filed a motion for substitution of respondent (ECF No. 142), requesting that Adam Paul Laxalt be substituted for Frankie Sue Del Papa as the respondent Attorney General of the State of Nevada, as Laxalt now holds that office. LaPena did not respond to that motion. Pursuant to Federal Rule of Civil Procedure 25(d), and good cause appearing, the court will grant respondents' motion, and direct the clerk of the court to update the docket for this case to reflect the substitution.

APP. 095

Factual Background and Procedural History

In its opinion dismissing LaPena's appeal from his 1989 conviction, the Nevada Supreme Court summarized the facts, as disclosed by the evidence at trial, as follows:

> ... Frank LaPena was found guilty of initiating the contract murder of Hilda Krause, 71, at her home on January 14, 1974. Marvin Krause, her husband, was at that time the slot manager for Caesar's Palace in Las Vegas. He was knocked senseless. One Gerald Weakland, who had agreed to execute the murder contract, and an associate, escaped with assorted jewelry and a TV set.
>
> Within a few days, a police confidential informant pointed a finger at Gerald Weakland. Eventually a "love" triangle emerged. Marvin Krause was involved with Rosalie Maxwell, a cocktail waitress at Caesar's. Maxwell was also involved with Frank LaPena, whom she described to police as her "true love" while Mr. Krause was her "live one." LaPena, a bell captain at Caesar's, told the police that he knew about the Krause-Maxwell relationship and "he didn't care as long as the money kept coming in."
>
> According to Weakland's testimony, with Hilda Krause out of the way, Rosalie would then be free to marry Marvin Krause. LaPena would be the ultimate financial beneficiary. For his part, Weakland was offered $1,000 in advance and $10,000 in the future; in addition, considerable sums that Weakland, an inveterate gambler, owed LaPena, would be forgiven.

Order Dismissing Appeal, Exhibit L, pp. 1-2.[2] In its 1998 opinion, reversing the state district court's judgment granting LaPena post-conviction relief, the Nevada Supreme Court provided more factual detail, and the procedural background of the case to that point:

> At approximately 5:00 a.m. on January 14, 1974, the elderly couple of Hilda and Marvin Krause were robbed at their Las Vegas home located inside a walled country club community. During the course of the robbery, the perpetrators beat Mr. Krause and murdered Mrs. Krause. When police arrived at the Krause home, they found the deceased Mrs. Krause gagged with a scarf tied loosely around her neck, and a butcher knife imbedded in her back; her throat had been slit. An autopsy revealed that Mrs. Krause had been strangled with a cord or rope prior to having her throat slit and that she had sustained several stab wounds to her neck after her throat had been slit.
>
> Mr. Krause told police that he had been attacked by two Caucasian men after he opened his garage door and as he was getting into his car to go to work. The men forced him into the house where they beat him and tied him up, murdered Mrs. Krause, and stole a television, gold coins, and jewelry, including a diamond ring and a watch. Mr. Krause reported that after the assailants left his home, he untied himself and went upstairs in an attempt to aid Mrs. Krause. Physical evidence indicated that at least two perpetrators had been present at the Krause home. The perpetrators left the scene in Mr. Krause's car but abandoned it at the gates of the country club. Mr. Krause suffered a

[2] Unless otherwise stated, the exhibits referred to in this order are those filed by respondents, and located in the record at ECF Nos. 41-54.

head injury in the attack; he died the following year from unrelated causes.

Several days after the crime had been committed, a confidential informant (later identified as Joey Costanza) contacted Las Vegas Metropolitan Police Department (LVMPD) Detective Mike Whitney. Costanza told Det. Whitney that approximately six weeks before the Krause robbery/murder, Gerald Weakland had approached him about assisting in a robbery/murder to take place in the early morning hours of a Monday or Friday before one of the victims went to work and would involve scaling a wall of some sort. Costanza allegedly knew the exact location of the crime scene (i.e., the Krauses' address). Costanza also mentioned two other individuals who might have been solicited or involved in the crime – Tom Boutwell and Bobby Webb.

Det. Whitney gave this information to several police officers, including Lieutenant Beecher Avants and Detective Chuck Lee, who subsequently questioned Boutwell, Webb, and Weakland. In a February 1974 telephone conversation between Lt. Avants and Costanza, Costanza allegedly stated that he had never heard the names of LaPena or Rosalie Maxwell, LaPena's girlfriend, associated with Weakland or the Krause crimes. Police arrested Weakland for the Krause murder/robbery in March 1974.

During a preliminary hearing, Weakland admitted to the crimes and struck a deal with the State wherein he agreed to testify that Maxwell and LaPena had hired him to murder Mrs. Krause. In exchange for this testimony, Weakland was allowed to plead guilty to second degree murder, with a sentence of five years to life, and all other charges against him (some of which were unrelated to the Krause crimes) were dropped. In his March 29, 1974, confession, Weakland told authorities that while Boutwell, his accomplice, was robbing the Krause home, he slipped upstairs and murdered Mrs. Krause by slitting her throat with a single cut. Weakland maintained that he had not strangled Mrs. Krause or stabbed her in the neck. Weakland maintained that LaPena, an acquaintance to whom he owed money, had approached him at the end of December 1973, and asked him to kill Mrs. Krause. LaPena allegedly explained to Weakland that Mr. Krause was a wealthy slot manager at Caesar's Palace who was dating LaPena's girlfriend, Maxwell, who also worked at Caesar's. LaPena and Maxwell wanted Weakland to kill Mrs. Krause so that Maxwell could marry Mr. Krause and inherit the Krause fortune for the benefit of herself and her boyfriend, LaPena.

Weakland claimed that LaPena had offered to forgive his debts and pay him a large sum of money in exchange for Mrs. Krause's murder. On January 4, 1974, Weakland went to Maxwell's apartment where she and LaPena gave him $1000 as a down payment for the murder, told him that he would receive another $10,000 after Maxwell married Mr. Krause, and explained the "plan" for robbing the Krauses and murdering Mrs. Krause. Maxwell allegedly gave Weakland a map of the Krauses' residence during this meeting. Weakland stated that he asked Webb to help him commit the crime but, ultimately, Boutwell accompanied him. Weakland told police that he had never spoken to or had any contact with Mr. Krause prior to the January 1974 robbery/murder.

Based upon Weakland's statements to the police, on April 23, 1974, LaPena and Maxwell were arrested for the Krause robbery/murder. Both were charged with first degree murder and robbery with the use of a deadly weapon. The criminal complaint alleged that LaPena and Maxwell had entered into a contract with Gerald Weakland "whereby ... Weakland was to kill [Mrs. Krause]."

APP. 097

> Weakland testified to LaPena's guilt at LaPena's preliminary hearing; however, at both Maxwell's and LaPena's separate trials, Weakland testified that his prior testimony and statements implicating LaPena and Maxwell in the murder were false. *LaPena v. State*, 98 Nev. 135, 136, 643 P.2d 244, 244 (1982). Maxwell was acquitted at trial, but LaPena was convicted by a jury of one count of first degree murder and one count of robbery with the use of a deadly weapon.
>
> On direct appeal, this court reversed LaPena's conviction and remanded for a new trial on the ground that admission of Weakland's statements incriminating LaPena constituted reversible error. This court concluded that the State had improperly withheld "the benefits of a plea bargain or promise of leniency until after a purported accomplice [(i.e., Weakland)] had testified in a particular manner." *Id*. at 136-37, 643 P.2d at 244-45. Weakland was eventually charged with two counts of perjury, to which he entered an Alford plea and received probation.
>
> * * *
>
> LaPena's second jury trial commenced in May 1989, and he was again convicted of first degree murder and robbery with the use of a deadly weapon. LaPena did not testify on his own behalf. The trial court sentenced LaPena to life imprisonment without the possibility of parole for the murder of Mrs. Krause, and a concurrent thirty-year sentence for the robbery of the Krause home with the use of a deadly weapon. This court [the Nevada Supreme Court] affirmed LaPena's conviction and sentence. *LaPena v. State*, Docket No. 20436, 107 Nev. 1126, 838 P.2d 947 (Order Dismissing Appeal, June 27, 1991).
>
> * * *
>
> On June 3, 1992, LaPena filed the PCR [post-conviction relief] petition at issue. The district court denied LaPena's PCR petition without conducting an evidentiary hearing. On appeal, this court remanded the matter for an evidentiary hearing. *LaPena v. State*, Docket No. 23839, 109 Nev. 1404, 875 P.2d 1066 (Order of Remand, November 24, 1993). On December 3, 1993, LaPena filed a motion to dismiss the indictment based upon an alleged lack of evidence and a colorable claim of factual innocence." LaPena's motion to dismiss was subsequently consolidated with the PCR petition, and LaPena presented evidence in support of dismissal at the evidentiary hearing.
>
> The district court conducted the evidentiary hearing October 16-20, 1995. The district court then granted LaPena's PCR petition and vacated his conviction and sentence on the ground that LaPena had not received effective assistance of trial counsel. The district court denied LaPena's motion to dismiss and ordered the matter reset for a new trial.

State v. LaPena, 114 Nev. 1159,1160-65, 968 P.2d 750, 751-54 (1998) (opinion found in record at Exhibit R).

On the State's appeal from the grant of post-conviction relief, the Nevada Supreme Court ruled that "[t]he district court erred in granting respondent's petition for post-conviction relief on the basis

of ineffective assistance of counsel." *LaPena*, 114 Nev. at 1165, 968 P.2d at 754. The Nevada Supreme Court reversed the state district court's judgment granting LaPena post-conviction relief.

LaPena initiated this federal habeas corpus action on August 3, 2000. *See* Petition for Writ of Habeas Corpus, (ECF No. 7). On February 13, 2001, the respondents filed a motion to dismiss (ECF No. 16), seeking dismissal of the action "on the grounds that the instant petition contains claims substantially similar to habeas corpus claims currently being litigated in the Nevada State courts, and that the State courts should be given an opportunity to complete that pending litigation before federal habeas proceedings are initiated." Motion to Dismiss (ECF No. 16), p. 1. The court denied that motion on September 10, 2001 (ECF No. 29).

Respondents filed their answer on November 14, 2001 (ECF No. 40). LaPena then filed his reply to the answer (entitled "Petitioner's Partial Response in Opposition to Respondents Answer that Petitioner's Habeas Grounds Two-Three; Five-Six & Seven Are Unexhausted") on December 13, 2001 (ECF No. 57).

On July 24, 2002, the court dismissed the action on the ground that it was barred by the statute of limitations. *See* Report and Recommendation (ECF No. 60); Amended Order entered July 24, 2002 (ECF No. 67); Amended Judgment (ECF No. 68). LaPena appealed (ECF No. 69), and, on October 20, 2003, the court of appeals reversed and remanded, upon the State's concession that the district court had not considered the tolling effect, under 28 U.S.C. § 2244(d)(2), of all of LaPena's state post-conviction litigation. *See* Memorandum, ECF No. 77.

Following the remand, on March 15, 2004, LaPena filed a motion to supplement his habeas petition (ECF Nos. 84, 85), which was ultimately denied. LaPena appealed from the denial of that motion (ECF No. 100). That appeal was dismissed on October 18, 2005 (ECF No. 117).

Along with his motion to supplement his petition, on March 15, 2004, LaPena filed exhibits (ECF Nos. 84, 85, 86, 87) revealing that on March 26, 1999, he had initiated a second state habeas action. *See* Order of Affirmance, Exhibit 17 to Motion to Supplement Petition. In that case, the state trial court conducted evidentiary hearings, and then denied the petition, and on May 22, 2003, the

Nevada Supreme Court affirmed. *Id*. The Nevada Supreme Court held that LaPena's second state habeas action was procedurally barred. *See* Order of Affirmance, filed May 22, 2003, ECF No. 84, pp. 143-51.

On April 5, 2006, after mail sent to LaPena was twice returned to this court as undeliverable, the court dismissed his action for failure to comply with the local rule requiring litigants to promptly inform the court of changes of their addresses (ECF Nos. 121, 122).

On June 12, 2007, LaPena filed a notice of change of address and a motion to reopen this case (ECF Nos. 124, 125). That motion to reopen the case was denied on August 7, 2007 (ECF No. 126).

Some five years later, on June 1, 2012, LaPena filed another motion to reopen his case (ECF No. 127). In support of that motion, LaPena submitted a copy of a file-stamped notice of change of address dated February 14, 2005. It appeared to the court likely that a clerk's error resulted in the failure to properly file LaPena's notice of change of address, and, in turn, in the dismissal of this case. Therefore, on January 15, 2013, the court granted LaPena's second motion to reopen the case (ECF No. 134).

On May 12, 2014, the court issued an order (ECF No. 136), identifying three claims -- Grounds 5, 6, and 7 -- in LaPena's petition that are unexhausted in state court, and the court ordered LaPena to make an election regarding those unexhausted claims. On May 15, 2014, LaPena filed a notice of abandonment of his unexhausted claims (ECF No. 137).

Grounds 1, 2, 3, 4, 8, 9, and 10, of LaPena's habeas corpus petition remain to be adjudicated on their merits. On July 29, 2014, the court entered an order (ECF No. 139) granting the parties an opportunity to supplement their briefing to take account of any relevant changes in the law in the 13 years since respondents' answer and LaPena's reply were filed. On September 29, 2014, respondents filed a supplement to their answer (ECF No. 140), and on November 24, 2014, LaPena filed a supplemental reply (ECF No. 141).

Standard of Review

Because this action was initiated after April 24, 1996, the amendments to 28 U.S.C. § 2254 enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) apply. *See Lindh v.*

APP. 100

Murphy, 521 U.S. 320, 336 (1997); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir.2000), overruled on other grounds by *Lockyer v. Andrade*, 538 U.S. 63 (2003). 28 U.S.C. § 2254(d) sets forth the primary standard of review under AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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.

28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id*. (quoting *Williams*, 529 U.S. at 409).

The Supreme Court has further instructed that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 786 (2011) (citing

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). The Supreme Court has stated "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, __ U.S. __, 131 S.Ct. 1388, 1398 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt" (internal quotation marks and citations omitted)).

The state court's "last reasoned decision" is the ruling subject to section 2254(d) review. *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010). If the last reasoned state-court decision adopts or substantially incorporates the reasoning from a previous state-court decision, a federal habeas court may consider both decisions to ascertain the state court's reasoning. *See Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir.2007) (en banc).

Analysis

Ground 1

In Ground 1 of his habeas petition, LaPena appears to claim that his Fourteenth Amendment right to due process of law was violated because the State impeded the efforts of the defense to secure the testimony of Joseph Costanza. *See* Petition for Writ of Habeas Corpus (ECF No. 7), pp. 3-3E.

LaPena raised such a claim on his direct appeal. *See* Appellant's Opening Brief, Exhibit H, pp. 7-17. The Nevada Supreme Court ruled as follows:

> Appellant ... contends that the State impermissibly interfered with securing a potential defense witness for trial. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). However, it would appear from a careful review of the record, that the witness himself was principally responsible for his non-appearance, wishing to distance himself from the crime.

Order Dismissing Appeal, Exhibit L, p. 2. This court finds the Nevada Supreme Court's ruling to be objectively reasonable.

"[T]he suppression ... of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith of the prosecutor." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In *Brady*, the Supreme Court recognized a prosecutor's

obligation to disclose exculpatory evidence, whether substantive or for impeachment purposes, when such evidence is "material" to the defense. *See id*. Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The mere possibility an item of undisclosed information might have helped the defense or affected the outcome of the trial does not establish materiality. *See United States v. Agurs*, 427 U.S. 97, 109 (1976).

Federal habeas corpus relief is only granted if the state court adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court." 28 U.S.C.A. § 2254(a). A *Brady* violation will not result in habeas corpus relief unless the improperly withheld evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

To establish a *Brady* violation, the petitioner must show: that the evidence was favorable to him, either because it is exculpatory or because it is impeaching; that the evidence was willfully or inadvertently suppressed by the prosecution; and that he was prejudiced by the failure to disclose. *Strickler v. Green*, 527 U.S. 263, 281-82 (1999).

There is no showing that the prosecution failed to disclose the identity or whereabouts of Joseph Costanza. Rather, the record reflects that the prosecution made the disclosure to LaPena on October 17, 1983, *some six years before LaPena's second trial*. *See* Transcript of Evidentiary Hearing, Exhibit N, p. 689; *see also LaPena*, 114 Nev. at 1163-65 1171-73, 968 P.2d at 753-54, 758-59. Moreover, LaPena makes no showing that the testimony of Costanza would have been such as to put his case in such a different light as to undermine confidence in the verdict. *See Kyles*, 514 U.S. at 435; *see also LaPena*, 114 Nev. at 1171-73, 968 P.2d at 758-59.

The state court's denial of the claim asserted by LaPena as Ground 1 of his federal habeas petition was not contrary to, or an unreasonable application of *Brady*, or any other clearly established federal law as determined by the Supreme Court, and the state court's ruling was not based on an

APP. 103

unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d). The court will deny habeas corpus relief with respect to Ground 1.

Grounds 2 and 3

As the court understands Grounds 2 and 3, LaPena claims that his right to due process of law, under the Fourteenth Amendment, was violated because the State withheld exculpatory evidence before the grand jury. Petition for Writ of Habeas Corpus, pp. 5-5A, 7-7D. LaPena claims that the prosecution did not disclose to the grand jury certain information impacting the credibility of Gerald Weakland and Irwin Fish. *Id*.

LaPena made such a claim on his direct appeal, and the Nevada Supreme Court ruled:

> ... LaPena claims that the prosecution failed to disclose exculpatory conduct to the grand jury, more specifically, "the concessions and benefits bestowed upon Weakland." In the grand jury proceeding, the prosecutor presented all the salient exculpatory evidence relevant to the issues at trial. The grand jury was indisputedly told that Weakland was serving a life sentence for murder, that he had pled to second degree murder in return for his testimony in the first LaPena trial, and that the State's new agreement in the second LaPena trial was an offer to cease writing negative letters in Weakland's regard to the State's Parole Board. Weakland informed the grand jury of the most devastating information about his credibility: convictions for two counts of perjury in connection with an earlier LaPena prosecution. The prosecutor did not divert the attention of the grand jury from the facts. *See Clem v. State*, 104 Nev. 351, 358, 760 P.2d 103, 107 (1988) (overruled on other grounds). We conclude that the grand jury properly "received a fair presentation of the facts...." *Clem*, 104 Nev. at 358, 760 P.2d at 107.

Order Dismissing Appeal, Exhibit L, p. 2.

The state supreme court's ruling was a matter of Nevada law. This court, in a federal habeas corpus action, does not review state-court determinations of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Moreover, LaPena does not cite authority for the proposition that the failure to disclose exculpatory evidence to a grand jury, in a state-court prosecution, violates a defendant's federal constitutional rights. The Fourteenth Amendment does not impose the requirement of indictment by grand jury upon the states. *See Jeffries v. Blodgett*, 5 F.3d 1180, 1188 (9th Cir.1993) (citing *Hurtado*

APP. 104

v. California, 110 U.S. 516 (1884), and *Rose v. Mitchell*, 443 U.S. 545, 557 n.7 (1979)).

The state court's denial of the claims asserted by LaPena in this case as to Grounds 2 and 3 was not contrary to, or an unreasonable application of any clearly established federal law, as determined by the Supreme Court, and the state court's ruling was not based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d). The court will deny habeas corpus relief with respect to Grounds 2 and 3.

Grounds 4 and 9

In Grounds 4 and 9 of his habeas petition, as this court construes those claims, LaPena asserts that his federal constitutional right to due process of law was violated because there was insufficient evidence to convict him of murder. Petition for Writ of Habeas Corpus, pp. 9-9D, 19-19O.

LaPena made such a claim in state court, *see* Exhibit H, p. 28, and the Nevada Supreme Court ruled:

> ... LaPena is correct in stating that the testimony of the various witnesses presents a number of testimonial inconsistencies. The weight and credibility of conflicting testimony is a matter for the jury. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Where there is substantial evidence to support the jury's verdict, it will not be disturbed on appeal. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).
>
> In order to properly corroborate accomplice testimony, it is enough if circumstances and evidence from other sources tend on the whole to connect the accused with the crime charged. *LaPena v. Sheriff*, 91 Nev. 692, 696, 541 P.2d 907, 910 (1975). Reasonable inferences are permitted. *LaPena v. Sheriff*, 91 Nev. At 696,
>
> 541 P.2d at 910. The jury may properly consider the "composite of facts and circumstances." *See LaPena v. State*, 92 Nev. 1, 3, 544 P.2d 1187, 1188 (1976).
>
> In the instant case, Gail Hodges, Weakland's former wife, testified to a series of furtive visits closely tied in time to Hilda Krause's murder. These involved LaPena and Weakland where Weakland demanded that she perform the role of a go-between. The jury could also properly consider that Weakland had a tenuous connection with the Krauses, while LaPena's link was more ominous and direct. In addition, both Maxwell and LaPena tried to plant false leads with the police. LaPena appeared considerably apprehensive when he met with police in order to impart this disinformation. Ms. Hodges testified that Weakland would do anything for LaPena.
>
> The jury was entitled to consider the murder of Hilda Krause as a whole. Her methodical demise with a kitchen knife when she was tightly bound and offered no resistance, while her husband was only beaten and knocked unconscious, raises the inference that more was at stake than the robbery. [Footnote: Jewelry which an accomplice unceremoniously threw away and which troubled Justice Gunderson in his

APP. 105

> ten-page dissent to *LaPena v. State*, 92 Nev. 1, 544 P.2d 1187 (1976), would appear to be explained on the basis of a more developed trial record. Weakland secreted away Marvin Krause's valuable diamond-studded watch and ring while giving an accomplice worthless costume jewelry. *See LaPena*, 92 Nev. at 9 n.3, 544 P.2d at 1192 n.3.] Taken together, such factors may be deemed inculpatory, and more than mere coincidence. *LaPena v. Sheriff*, 91 Nev. 692, 696, 541 P.2d 907, 910 (1975). The jury could conclude that the murder was indeed what had been planned all along, a staged execution.

Order Dismissing Appeal, Exhibit L, pp. 3-4.

In addition, in ruling on LaPena's claims of ineffective assistance of counsel, in his first state habeas action, the Nevada Supreme Court commented on LaPena's theory of the case, and the evidence supporting his conviction:

> LaPena theorizes that Mr. Krause killed Mrs. Krause after Weakland left the Krause residence on the morning of January 14, 1974. LaPena relies on the fact that Weakland has consistently stated that he killed Mrs. Krause by slitting her throat; although the autopsy showed multiple stab wounds in Mrs. Krause's neck and strangulation as the cause of death, Weakland maintains that he never stabbed or strangled her. Weakland testified that he did not check to see if Mrs. Krause was alive when he left the scene. LaPena asserts that all of this "exculpatory information" combined with Martinez' testimony at the evidentiary hearing demonstrates his factual innocence and his trial counsel's failure to properly investigate his case. We disagree.
>
> Mills testified that efforts were made to uncover a connection between Weakland and Mr. Krause, and even if counsel had created a stronger connection between Weakland and Mr. Krause, *there was overwhelming evidence that LaPena hired Weakland to commit the murder*. Weakland never named anyone other than LaPena as the person who hired him to kill Mrs. Krause. Also, Webb testified at the 1989 trial that Weakland had told him that LaPena and Maxwell had hired him to kill Mrs. Krause. Also Webb testified at the 1989 trial that Weakland had told him that LaPena and Maxwell had hired him to kill Mrs. Krause. Weakland's accomplice, Boutwell, also testified that LaPena had orchestrated the plan to kill Mrs. Krause. An inmate who had shared a cell with LaPena testified at the second trial that LaPena had admitted his involvement in Mrs. Krause's murder. Det. Lee testified that shortly after the murder, LaPena accompanied Maxwell to the police station for questioning, and when officials interviewed LaPena he was quite upset and emotionally fell apart during the interview. One week later LaPena, still extremely nervous, contacted Det. Lee to tell him that the person who killed Mrs. Krause was an individual identified only as "Charlie the knife from Chicago." Telephone records admitted into evidence revealed that one or two days after the murder, Weakland and his wife called LaPena's residence from the Windsow Hotel in Lake Havasu, where they spent a day or two.
>
> From the evidence presented at the evidentiary hearing, we conclude that LaPena has failed to show that counsel was deficient in pursuing the alleged Krause-Weakland connection; even if counsel was deficient, LaPena failed to show prejudice under [*Strickland v. Washington*, 466 U.S. 668 (1984)]. Having concluded that LaPena was properly convicted at his 1989 trial, we affirm the district court's denial of LaPena's motion to dismiss the charges against him.

LaPena, 114 Nev. at 1174, 968 P.2d at 759-60 (emphasis added); *see also id*. at 1167 (pointing out that LaPena's trial counsel extensively cross-examined Weakland regarding the inconsistencies between his testimony and the findings of the coroner); Answer (ECF No. 40), pp. 25-34 (respondents' summary of evidence incriminating LaPena).

With respect to a claim that there was insufficient evidence presented at trial to support a state-court conviction, the role of the federal court is to determine whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "The reviewing court must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all evidentiary conflicts in a manner that supports the verdict." *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir.1995) (citation omitted).

Here, while there was conflicting evidence at trial, and while Weakland, one of the prosecution's main witnesses, was subject to significant impeachment, there was plainly sufficient evidence from which a rational trial of fact could have found that LaPena hired Weakland to kill Hilda Krause. The state court's denial of the claims asserted by LaPena as Grounds 4 and 9 of his federal habeas petition was not contrary to, or an unreasonable application of *Jackson*, or any other clearly established federal law, as determined by the Supreme Court of the United States, and was not based on an unreasonable determination of the facts in light of the evidence presented. See 28 U.S.C. § 2254(d). The court will deny habeas corpus relief with respect to Grounds 4 and 9.

Ground 8

In Ground 8, LaPena claims that his federal constitutional rights were violated because he received ineffective assistance of trial counsel. Petition for Writ of Habeas Corpus, pp. 17-17Q.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two prong test for analysis of claims of ineffective assistance of counsel: the petitioner must demonstrate (1) that the defense attorney's representation "fell below an objective standard of reasonableness," and (2) that

the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id*. at 689. The petitioner's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. And, to establish prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, the errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687.

Where a state court has adjudicated a claim of ineffective assistance of counsel under *Strickland*, establishing that the decision was unreasonable under AEDPA is especially difficult. *See Richter*, 562 U.S. at 104-05. In *Richter*, the Supreme Court instructed:

> The standards created by *Strickland* and § 2254(d) are both highly deferential, [*Strickland*, 466 U.S. at 689]; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, [*Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Richter, 562 U.S. at 105; *see also Cheney*, 614 F.3d at 994-95 (acknowledging double deference required with respect to state court adjudications of *Strickland* claims).

In LaPena's first state habeas action, the state district court held an extensive evidentiary hearing regarding LaPena's claims of ineffective assistance of counsel. *See* Exhibit N (transcript of evidentiary hearing). The state district court granted LaPena relief, but the Nevada Supreme Court reversed, denying LaPena's claims of ineffective assistance of counsel. *See LaPena*, 114 Nev. at 1165-74, 968 P.2d at 754-60. This court finds the Nevada Supreme Court's exhaustive analysis of LaPena's claims

of ineffective assistance of counsel to be objectively reasonable. *See id.*

The state court's denial of the claims asserted by LaPena as Ground 8 of his federal habeas petition was not contrary to, or an unreasonable application of, *Strickland*, or any other clearly established federal law, as determined by the Supreme Court, and was not based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d). The court will deny habeas corpus relief with respect to Ground 8.

Ground 10

In Ground 10, LaPena claims that the State withheld exculpatory material from the defense. Petition for Writ of Habeas Corpus, pp. 21-21E. Specifically, he appears to claim that the following materials were withheld: (a) contents of a New Jersey interview of Costanza by Detective Lee; (b) contents of a Florida interview of Costanza by Detective Lee; (c) contents of a prison interview between Weakland and Detective Lee, and an accompanying statement made by Weakland; and (d) information regarding favors provided to Weakland in exchange for his testimony. *Id.*

Respondents state that this claim has been exhausted in state court, and that the Nevada Supreme Court denied the claim in its 1996 decision, without discussion. Answer, pp. 53-54.

This court concludes that LaPena's *Brady* claims have no merit, and that the state court's denial of them was objectively reasonable.

Regarding the first two categories of material allegedly withheld by the prosecution -- information about interviews of Constanza -- LaPena makes no specific allegations regarding the materiality of the allegedly withheld information, and there is no showing in that regard in LaPena's briefing of the claims. LaPena has not proferred any evidence showing what exculpatory information was allegedly withheld and what bearing it would have had on his trial. LaPena does not show that anything allegedly withheld from the defense regarding Detective Lee's contacts with Costanza was material, such that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Bagley*, 473 U.S. at 682.

. . .

APP. 109

Similarly, with respect to the third and fourth categories of material allegedly withheld by the prosecution -- information about Weakland -- the court discerns no clear allegation, no argument in LaPena's briefing, and no proffer of any evidence, that there was any exculpatory information concerning Weakland withheld from the defense.

Furthermore, one of the prosecutors on LaPena's case testified, at the evidentiary hearing in state court, that the prosecution maintained an open file policy, and handled LaPena's case like any other. *See* Exhibit N, pp. 699-706. He testified that the prosecution withheld no evidence from the defense. *See id*.

This court finds that the Nevada Supreme Court's denial of the claims asserted by LaPena in Ground 10 of his federal habeas petition was not contrary to, or an unreasonable application of, *Brady*, or any other clearly established federal law, as determined by the Supreme Court, and was not based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d). The court will deny habeas corpus relief with respect to Ground 10.

Certificate of Appealability

The standard for issuance of a certificate of appealability calls for a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c).

The Supreme Court interpreted 28 U.S.C. §2253(c) as follows:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). The Supreme Court further illuminated the standard in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must

APP. 110

> demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Miller-El, 123 S.Ct. at 1040 (quoting *Slack*, 529 U.S. at 484).

The court has considered LaPena's claims in Grounds 1, 2, 3, 4, 8, 9, and 10, with respect to whether they satisfy the standard for issuance of a certificate of appeal, and the court determines that none of his claims do. The court will deny LaPena a certificate of appealability.

IT IS THEREFORE ORDERED that respondents' Motion for Substitution of Respondent (ECF No. 142) is **GRANTED**. The clerk of the court shall update the docket in this case to reflect that Adam Paul Laxalt is substituted for Frankie Sue Del Papa as the respondent Attorney General of the State of Nevada.

IT IS FURTHER ORDERED that petitioner Frank Ralph LaPena's Petition for Writ of Habeas Corpus (ECF No. 7) is **DENIED**.

IT IS FURTHER ORDERED that petitioner is denied a certificate of appealability.

IT IS FURTHER ORDERED that the clerk of the court shall enter judgment accordingly.

Dated this 11th day of May, 2015.

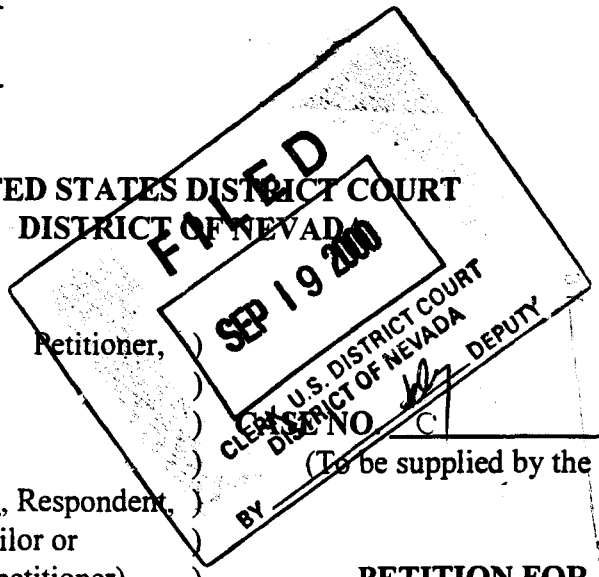
RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

APP. 111

FRANK RALPH LaPENA
Name
28907
Prison Number

Place of Confinement

CV-S-00-0960-PMP-RJJ



UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANK RALPH LaPENA, Petitioner,
(Full Name)

vs.

GEORGE GRIGAS, Respondent,
(Name of Warden, Superintendent, jailor or authorized person having custody of petitioner)

and

FRANKIE SUE DEL PAPA

The Attorney General of the State of Nevada.

CASE NO. C
(To be supplied by the Clerk)

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY (NOT SENTENCED TO DEATH)

---

1. Name and location of court, and name of judge, that entered the judgment of conviction you are challenging: Eighth Jud. Dist. Ct., 200 S. Third St. Las Vegas, NV; Hon. Thomas Foley.

2. Full date judgment of conviction was entered: 7 /14 / 89. (month/day/year)

3. Did you appeal the conviction? X Yes ___ No. Date appeal decided: 6 / 27 / 91.

4. Did you file a petition for post-conviction relief or petition for habeas corpus in the state court? X Yes ___ No. If yes, name the court and date the petition was filed: Eighth Judicial District Court 6 / 3 / 92. Did you appeal from the denial of the petitior for post-conviction relief or petition for writ of habeas corpus? X Yes ___ No. Date the appeal was decided: 12 / 7 / 98. Have all of the grounds stated in this petition been presented to the state supreme court? X Yes ___ No. If no, which grounds have not? Not Applicable (N/A)

5. Date you are mailing (or handing to correctional officer) this petition to this court: ___/___/___

Attach to this petition a copy of all state court written decisions regarding this conviction.

APP. 112

6. Is this the first federal petition for writ of habeas corpus challenging this conviction? X Yes ___ No. If no, what was the prior case number ? _____. And in what court was the prior action filed? _____. Was the prior action ___ denied on the merits or ___ dismissed for procedural reasons (check one). Date of decision: ___/___/___. Are any of the issues in this petition raised in the prior petition? ___ Yes ___ No. If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this successive petition? ___ Yes ___ No.

7. Do you have any petition, application, motion or appeal (or by any other means) now pending in any court regarding the conviction that you are challenging in this action? X Yes ___ No. If yes, state the name of the court and the nature of the proceedings: Nevada Supreme Court, Case No. Appeal from denial of writ of habeas corpus.

8. Case number of the judgment of conviction being challenged: C59791.

9. Length and terms of sentence(s): Life W/O on Count I; 30 years Count II, concurrent to Count I

10. Start date and projected release date: May 20, 1989, none.

11. What was (were) the offense(s) for which you were convicted: Murder-Count I, and Robbery with Use of a Deadly Weapon-Count II.

12. What was your plea? ___ Guilty X Not Guilty ___ Nolo Contendere. If you pleaded guilty or nolo contendere pursuant to a plea bargain, state the terms and conditions of the agreement: N/A.

13. Who was the attorney that represented you in the proceedings in state court? Identify whether the attorney was appointed, retained, or whether you represented yourself *pro se* (without counsel).

	Name of Attorney	Appointed	Retained	*Pro se*
arraignment and plea	Oscar B. Goodman & Douglas Crosby	___	X	___
trial/guilty plea	Harry Reid & Bruce Alverson	X	___	___
sentencing	Harry Reid	X	___	___
direct appeal	Richard Wright & Louis Weiner (1977) Carmine Colucci & Gary Gowen (1989)	X	___	___
1st post-conviction petition	David Schieck	X	___	___
appeal from post conviction	David Schieck	X	___	___
2nd post-conviction petition	Carmine Colucci, Pro Bono	___	___	___
appeal from 2nd post-conviction	Carmine Colucci	X	___	___

APP. 113

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 1

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fourteenth Amendment right to the United States Constitution, based on these facts: (Inability of defense to secure the attendance of a crucial material witness; refusal of trial judge to allow investigator funds and **access** to secure his attendance or deposition)

1) On August 31, 1983, the Nevada Supreme Court ordered the State to produce the Name and Whereabouts of a Confidential Informant (C.I.) (later identified as JOSEPH COSTANZA a.k.a. JOEY STARR), or incur a dismissal. The Court also recognized, noted and stated that: **a)** the transcript of the grand jury proceedings which resulted in the indictment contains statements by Weakland manifesting confusion as to the parties involved in the murder and the informant has advised police of statements by Weakland which are **inconsistent** with Weakland's testimony before the **grand jury** and his testimony in the **prior** proceedings; **b)** that the significance of the **informer's testimony** is manifest for Petitioner to be able to cross-examine Weakland based on **the factors** cited above; **c)** that the value and importance of the potential **testimony of the informant** was necessary for a fair determination of the issue of guilt or innocence in this case and that **d)** the Defendant **had a right** to inform the jury of those facts from which they could determine the informer's credibility; The Court also **made specific Conclusions of Law** regarding Petitioner's constitutional rights when the Court concluded "Denial of Petitioner's right of effective cross-examination would be constitutional error of the first magnitude and, because Petitioner's **right to prepare for trial and to cross-examine witnesses** " against him ... the error was of constitutional magnitude (Record on Appeal) R.O.A. P. 898-899; ff. 686, 688; See also

SUPPORTING FACTS: APP. 114

Appellant's Opening Brief (A.O.B), at P. 7-8 & 25-26, **6/25/90** and **Appellant's Reply Brief (A.R.B.)**, at P. 10, **12/24/90**.

2) On October 17, 1983, the State provided the address of the C.I. as located at 341 Sanford Avenue, Lynhurst, New Jersey. On October 5, 1984, Petitioner's Motion to take the Deposition of the Out of State Witness was denied by the District Court for **financial** reasons.

3) On October 22, 1985, the Nevada Supreme Court concluded that in their prior order of August 31, 1983, they expressly recognized the manifest "**significance of Costanza's testimony**" and also held and ordered that there would be **no financial restraints to be imposed upon the Petitioner** since petitioner **cannot be denied meaningful access to a crucial defense witness** solely on the basis of such considerations (R.O.A. P. 1318, at 1319-1320); (**AOB**, at P. 8, **6/25/90**; **ARB**, at P. 8, **12/24/90**; **RAB-AOB**, at P. 54, **10/1/97**)

4) On January 2, 1985, Counsel Gary Gowen, personally went over to the District Attorney's Office and requested prosecutor Mel Harmon's help in placing the C.I. in the (N.C.I.C.) System and Mr. Harmon **refused** to involve his office in assisting Petitioner to secure the presence of the C.I. because the C.I. was **now** the defense's witness, **not** the prosecutions, where he also **admitted** at a January 16, 1985, hearing that: "the informant was a defense witness and **it was for them to secure Mr. Costanza's presence not the state**". (R.O.A. 1370-1374; **A.O.B.**, at P. 12, **6/25/90**). Counsel Gowen after being denied by Mr. Harmon in securing the presence of the C.I. then enlisted the aid of the LVMPD to register the trial court's Material Witness Warrant in the N.C.I.C. System. (**A.R.B.**, at P. 4, **12/24/90** & R.O.A. 1171-1174; 1370-1381)

5) On January 15, 1985, the LVMPD advised Mr. Harmon the C.I. was arrested pursuant to the court's warrant and was "**ordered**" by Mr. Harmon to **release** the matter to the District Attorney's Office and to "**discontinue**" all further involvement (R.O.A. 1223-24; **A.R.B.**, at P. 5 & 11, Affidavit of Detective HATCH)

GROUND ONE (CONTINUED)

APP. 115

SUPPORTING FACTS:

6) On January 15, 1985, Mr. Harmon dispatched two (2) of his investigators to the State of Florida **without the necessary certified documents** to defeat the C.I.s habeas corpus petition(**A.O.B.,** at P. 12, Lns 24-25, **6/25/90**; and **A.R.B.,** at P. 5-6 & 11, **12/24/90**; R.O.A. 1171-1174; 1370-1381).

7) The District Attorney's investigators did arrive before the C.I.s habeas corpus hearing, obtained an **interview** with the C.I. and **actually attended** the C.I.s habeas corpus hearing. (**A.R.B.,** at P. 12, **12/24/90**)

8) The Florida Court discharged the C.I. at the hearing **because** there were **no proper documents** from the State of Nevada **presented** to that Court to show the authority for the C.I.s arrest and detention(**A.R.B.,** at P. 12, **12/24/90**)

9) District Judge Michael Wendell made a **specific factual finding** on the importance and necessary testimony of Costanza and another witness when he held that:"...**Joseph Costanza** ... and William Edward Johnson ... are **each material and necessary witnesses for the defense**, and whose **testimony cannot be duplicated or substituted with any other evidence or testimony"** (R.O.A. 848 and **A.R.B.,** at P. 9, **12/24/90**)

10) District Judge Thomas Foley also made **specific factual findings** on Costanza's importance as a defense witness, when on March 20, 1987,recognizing in his **order** the following facts: **"There exists no other available evidence 'which could replace' the evidence within the 'knowledge' of the C.I.".** That order in an attempt to take the C.I.'s deposition anywhere he could be found also held: That order represented Petitioner's **third attempt** to obtain service upon the C.I.; the C.I. had intentionally avoided process under the Uniform Act to Compel his attendance; the C.I. **had personal knowledge of admissions** through conversations he had with Mrs. Krause's murderer(i.e. Gerald Weakland) the C.I. **had provided the police with information** regarding the admissions of Mrs. Krause's murderer. (RO.O.A. 1247-1248 and **A.R.B.,** at P. 9, **12/24/90**)

11) On appeal, Petitioner argued and submitted **specific facts** to support

GROUND ONE (CONTINUED)

SUPPORTING FACTS:

his claim it was the State, not Petitioner, who was responsible for the loss of Costanza at the Florida hearing due to the fact **Counsel Gowen had actually provided the prosecutor with the proper documents to extradite Costanza back to Nevada if arrested under the warrant**, i.e. **1)** The District Attorneys Office **unilaterally ordered** the LVMPD to withdraw from handling the **routine** matters of Costanza's arrest(R.O.A. 1223-1241) ; **2)** the two investigators **were not given the proper documents** to extradite Costanza back to this State, despite, **a)** Mr. Harmon talked to the Florida District Attorney **prior** to Costanza's hearing and **b)** the investigators actually **interviewed** Costanza **before** his habeas hearing and **actually attended** his hearing, thus a reasonable mind could conclude the District Attorney's Office's (D.A.O.) interference was intentional since they made no efforts to secure a copy of the warrant by other means i.e. (Federal Express/Teletype/Fax or for a continuance to secure the documents to secure Costanza's extradition (**A.O.B.**, at P. 11-12, **6/25/90**; **A.R.B.**, at P. 4-5-6--11 & 12, **12/24/90**).

12) On appeal, Petitioner offered authority to support this argument (**A.R.B.**, at P. 12, **12/24/90**)

13) On appeal, Petitioner fairly presented specific and detailed facts to the Nevada Supreme Court as to **why** the prosecution did not want C.I. Costanza's attendance and in essence caused his loss as a witness through no fault of the defense because Costanza's testimony would have impeach Weakland, Robert Webb, (WEBB) , Thomas Boutwell (BOUTWELL) and Gail Weakland Hodges' (HODGES), testimony and that the prosecution had also not provided Petitioner's 1974, Counsel Oscar Goodman and Douglas Crosby with police reports which concerned C.I. Costanza during the preliminary hearing stages of this case. (**A.O.B.** , at Pgs. 12-13-14-15-16 & 17).

14) On appeal, Petitioner argued in view of the D.A. unilaterally ordering the LVMPD to withdraw from further participation in handling the routine matters

GROUND ONE (CONTINUED)

SUPPORTING FACTS:

of Costanza's Florida arrest, that office must take responsibility for the loss of Costanza as a witness (**A.R.B.**, at P. 5, **12/24/90**; R.O.A. 1223-1241)

15) On March 29, 1974, on the day WEAKLAND gave a statement regarding the homicide detective Avants requested to a fellow officer **to drop charges** against Costanza's nephew (Jerry Costanza) because of Costanza's assistance in a homicide investigation (**A.R.B.**, at P. 13-14, **12/24/90**; R.O.A. 921-922)

16) On March 17, 1987, the State objected to the amount of money to provide Petitioner's investigator to locate and service the C.I. with a certified warrant and the Court **ordered** it would not spend another nickel to have the said investigator go back and get the C.I. (**A.R.B.**, at P. 3, **12/24/90**); and on April 21, 1988, the trial court **again** stated in would **not** undertake to give Petitioner's defense another dime to get the C.I.

17) On October 18, 1988, the trial court **ordered** that Petitoner, his counsel and investigator **were now precluded from even contacting the C.I.** when the court ordered: "**MR. HARMON, I am denying any attempt by them to mess with Mr.Costanza**" (**A.O.B.**, at P. 9, **6/25/90**; **A.R.B.**, at P. 8, **12/24/90**; R.O.A. 2463, Lns 23-24)

18) On November 22, 1988, the trial court in a "written order" denied financial investigative funds to obtain the C.I. as well as funds to obtain Petitioner's other two out of state witnesses which was against the previous **order** issued by Judge Michael Wendell.

19) On May 8th, 1989, the trial court denied Petitioner's Motion For Fees For Investigator and denied Petitioner "**access**" to obtain the C.I.'s testimony. and again on May 9th, 1989, the trial court signed an order stating:"**IT IS FURTHER ORDERED that none of the monies approved herein may be used for the purpose of locating JOSEPH COSTANZA , or in any way producing Mr. Costanza as a defense witness**"

20) On appeal, Petitioner argued the trial court had violated the appellate order that is not only the law of the case but the principle of rule of law as

GROUND ONE (CONTINUED)

APP. 118

SUPPORTING FACTS:

well. That it contravened the Nevada Supreme Court's previous orders and further **actually hindered the 'access'** by the defense to the **only** witness who could really impeach WEAKLAND. Petitioner also argued that the failure to secure the attendance of a witness this Court has already **held** to be a major important witness **has caused a miscarriage of justice** violating petitioner's right to due process of law and **requested** the appellate court to review the entire order granting the Petition for Writ of Mandate filed August 31, 1983, in order to get the full impact of proceedings **without Costanza (A.O.B., at P. 9-10-11, 6/25/90)**

APP. 119

Exhaustion of state court remedies regarding Ground 1:

▸ **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

_X_ Yes ___ No. If no, explain why not: N/A

▸ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

___ Yes _X_ No. If no, explain why not: N/A

If yes, name of court: N/A date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

▸ **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes _X_ No. If yes, explain why: N/A

If yes, name of court: ___ date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

▸ **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: N/A

APP. 120

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 2

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fourteenth Amendment right to the United States Constitution based on these facts: (State withheld exculpatory evidence before the Grand Jury to obtain a true bill and Grand Jury indictment)

1) The State refused to confer the benefits of the plea bargain with Gerald Weakland until "**after**" his appearance before the grand jury (**A.R.B.**, at P. 15, **12/24/90**; R.O.A. 2334-2335)

2) The State did not tell the grand jurors WEAKLAND received probation for his perjury counts and was assured that his probation would be terminated after two years good behavior to enhance his opportunity for parole (**A.R.B.**, at P. 16, **12/24/90**;).

3) Grand jurors were also not told Parole Board Chairman, Bryan Armstrong, told WEAKLAND "before" his grand jury testimony, that his prospects for parole would be enhanced if he took the stand and testified for the State. (**A.R.B.**, at P. 16, **12/24/90**; R.O.A. 1368-1369)

4) The State also withheld the benefit of a separate plea bargain with State witness, IRWIN FISH (FISH) until **after** his testimony against Petitioner before the grand jury (**A.R.B.**, at P. 15, **12/24/90**; R.O.A. 2169-2182)

5) Grand jurors were not told Magistrate B. Mahlon Brown made a **specific finding** at Petitioner's 1974, preliminary hearing that FISH'S testimony was **incredible** and **unworthy of belief** and in a "written order" struck FISH'S said testimony from the record "**as undeserving of belief**"(**A.O.B.**, at P. 26; 29 & 40, **6/25/90**).

6) On appeal, Petitioner argued if WEAKLAND did not follow the State's version of the truth, they would have again charged him with perjury, or

GROUND TWO: (CONTINUED)

SUPPORTING FACTS:

could have violated his parole because WEAKLAND could not be trusted to keep his part of the bargain; and further argued that FISH'S grand jury testimony and trial testimony should be stricken by the Court's consideration of the appeal (A.R.B., at P. 16-17-18 & 35; 12/24/90)

7) On appeal, Petitioner argued the indictment against him is constitutionally and judicially infirm and should be dismissed (A.R.B., at P. 19, 12/24/90

8) On February 1, 1983, Petitioner filed "Points and Authorities in Support of Petition for Habeas Corpus" and cited United States Supreme Court authorities regarding the State withholding exculpatory evidence from the September 29, 1982, grand jury and also knowingly permitted witnesses to testify upon key and material facts and alerted the Court that the Franklin Rule violation was tantamount to prosecutorial misconduct; that WEAKLAND'S testimony is so incredible and so suspect that it is constitutionally defective to support any allegation of incrimination against Petitioner, and, Petitioner alerted the Nevada Supreme Court of these issues upon filing a notice of appeal of the District Court's denial of his application for habeas corpus petition.

APP. 122

Exhaustion of state court remedies regarding Ground 2:

▸ **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

_X_ Yes ___ No. If no, explain why not: N/A

▸ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

___ Yes _X_ No. If no, explain why not: N/A

If yes, name of court: N/A date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

▸ **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes _X_ No. If yes, explain why: N/A

If yes, name of court: ___ date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

▸ **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: N/A

APP. 123

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 3

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fourteenth Amendment right to the United States Constitution, based on these facts: (Withholding of Exculpatory Evidence from the Grand Jury and Prosecutorial Misconduct)

1) State failed to disclose WEAKLAND'S statements to the grand jury were materially inconsistent with his prior statements and other evidence known by the State: **a)** The January 18, and February 8, 1974, C.I. police reports that refuted WEAKLAND'S grand jury testimony and prior statements as to the real parties involved in the homicide and the timing of the alleged murder contract where WEAKLAND claimed that : **a)** On January 4th, 1974, a **Friday** night , between **8:00 P.M. & 9:00 P.M.** he went over to Rosalie Maxwell's house Maxwell answered the door and petitioner was present ; **b)** he was given One-Thousand Dollars by Maxwell and entered into and conspired with Maxwell and Petitioner to murder Hilda Krause; and that **c)** he **first** became aware of the location of the Krause's residence from a **map** given to him by Maxwell; **d)** that he **first** became aware what time Marvin Krause left for work; **e)** that he **first** became aware that a **security wall** had to be climbed; and **f)** that he **first** became aware that it had to be done on one of two days a week, a Monday or Friday, **however**, the two C.I. police reports state: **a)** the informant said WEAKLAND solicited him **six weeks before the murder** ; **b)** Weakland **already knew** the location of the Krause's residence as Weakland had a **map**; **c)** that a **wall** had to be climbed ; **d)** what **time** Krause left for work and what days of the week this could be done; **e)** that Hilda Krause was only to receive a beating and Marvin Krause a feined beating only enough to make it look good; and, **f)** two other individuals both football players and one named "**TOM**" were with WEAKLAND

GROUND THREE (CONTINUED)

SUPPORTING FACTS:

(A.O.B., at P. 13-14-15 & 20, **6/25/90; A.R.B.**, at P. 22-23-24, **26-27, 12/24/90)**

2) On appeal, Petitioner presented to the Court, WEAKLAND impeached his own grand jury testimony and original 1974, preliminary hearing testimony, when he testified before the Honorable Thomas O'Donnell on December 8, 1983, that **"WEAKLAND AGREED that the police report of Costanza's account of the facts was accurate**, which statement is materially inconsistent with WEAKLAND'S story of the case." Petitioner argued WEAKLAND **admitted** that every fact that Costanza reported to the police with regard to the Krause murder '**was true and correct**'. (**A.R.B.**, at P. 22, **12/24/90; A.O.B.**, at P. 25, **6/25/90)**

3) On appeal, Petitioner argued, WEAKLAND **impeached** his own grand jury testimony when he testified on December 8, 1983, making his account of the beginning of the murder plot **consistent** with Costanza's version. WEAKLAND, thus **admitted; (a)** That Weakland had talked to Costanza in the **fall of 1973** about the Krause robbery; **(b)** WEAKLAND had to climb a **wall** to get to the Krause residence; **(c)** the time Krause left for work and **(d)** that accomplices BOUTWELL, and WEBB , were with WEAKLAND at the fall, 1973 discussion(**A.R.B. P.**22)

4) State failed to disclose police reports it knew existed also refuted Det. BEECHER AVANTS testimony of having made no connection between Costanza and the Krause murder until **1983.** (**A.R.B.**, at P. 21, **12/24/90;** R.O.A. 922-925)

5) State failed to disclose WEAKLAND **did not tell Costanza he had been hired by MARVIN KRAUSE, his "first" choice of accomplices to commit this crime and, that Petitioner was his "third" choice** (**A.R.B.**, at P. 23, **12/24/90;**ROA 1072-73)

6) On appeal, Petitioner presented to the Court, detailed specific undisputed facts constituting at that time "fifteen years" of prosecutorial misconduct, to wit: **1)** At WEAKLAND's March 28-29, preliminary hearing for the Krause murder, the State had knowledge of and possessed the C.I. police reports that connected WEAKLAND to the Krause murder, (R.O.A. 1477); **2)** When WEAKLAND provided one of his several accounts of the Krause murder on March 29,

GROUND THREE (CONTINUED)

APP. 125

SUPPORTING FACTS:

1974, prosecutor Harmon, Metro Officers LEE and AVANTS , each had personal knowledge at that time of Officer WHITNEY'S C.I. report and of LEE & LYONS report that were substantially at variance to WEAKLAND'S version of the murder (ROA P. 215-218; 239-240); **3)** During Petitioner's May 8 to June 12, 1974, preliminary hearing, the State intentionally suppressed from the magistrate and Petitioner **all** the police reports which reported the existence of a C.I.; **4)** The LVMPD is guided and directed by the D.A. in the release and distribution of police reports of the investigations of crimes and an authorization memo-orandum is required before "any police report is distributed to an accused or other person in a criminal matter (R.O.A. 1485-1486) ; **5)** Prosecutor Harmon **admitted** having **never issued** said "**authorization memorandum**" or other direct-ive regarding the circulation of the relevant police reports (ROA 2593); **6)** the prosecutor failed to disclose he knew the C.I. and his alias of JOEY STARR, at Petitioner's 1974, prelim. hearing, despite having assured defense counsel of **full disclosure.** Nor did Det. AVANTS reveal his several conversations with Costanza about the Krause murder **prior** to Petitioner's preliminary hearing and the same for Detective LEE (ROA 2313; 4303-4304); **7)** The State since 1969, had always known C.I. Costanza was a.k.a. JOEY STARR , and AVANTS **personally knew** Costanza was known as JOEY STARR since **March, 1974**, and knew Costanza's brothers **"FRANK"** and Nick (ROA 993; 925 & 3977); **8)** Prosecutor Harmon, testified erron-eously on December 8, 1983, that he first became aware of the contents of C.I. police reports, shortly before or during Petitioner's first trial in March, 1977, despite officials' (Woofter & Avants) testimony to the contrary(R.O.A. 2348; 1479; 2614) ; **9)** the prosecution since 1974, during Petitioner's prelim. hearing, **knew** from the C.I. reports that their witnesses WEAKLAND, WEBB, LEO SANDRA & GAIL WEAKLAND had testified falsely on a point relevant to their credibility and the State failed to correct the false testimony (ROA 97; 215-218; 239-240; 1047; 2313; 3973-3977) ; **10)** the September 29, 1982, grand jury

GROUND THREE (CONTINUED)

SUPPORTING FACTS:

was not told about the contents of the C.I. police reports nor the **oral** conversations Costanza made to AVANTS and Det. WHITNEY (97; 215-218; 239-240; 2313; 3973; 1047); **11)** Prosecutor Harmon **admitted** having full knowledge about the C.I. police reports and AVANTS' conversations with Costanza **prior** to the instant indictment (R.O.A. 2304; 2348-2349); **12)** State did not disclose to the grand jury that GERALD AND GAIL WEAKLAND"S testimony regarding the "disposal" of Mr. Krause's "**watch and ring**" purportedly taken in the murder-robbery had been directly **refuted** by accomplice WEBB who claimed to thrown them away. Nor, was the grand jury informed that a search of Rosalie Maxwell's and Petitoner's house produced **no "watch, ring or lead-lined gloves,"** which items were material to the case ; **13)** that despite judicial orders to do so, neither Detectives AVANTS or LEE produced any police reports of their personal conversations with Costanza and suppressed **all** information regarding these personal conversations with Costanza from the Petitioner and his attorneys (**A.R.B.**, at Pgs 24-25-26-27 & 37, **12/24/90**)

7) Failed to disclose to the grand jury **all** the concessions and benefits the State bestowed upon Weakland that: **(1)** the State had dismissed **all** charges against WEAKLAND kidnapping Mr. Obenauer and shooting him in both his legs and leaving him out in the desert to die; **(2)** WEAKLAND was sentenced to "time served" for the brutal assault and battery upon Jessie Bond; (3) that "damning letters"had been written to the parole board by Mr. Harmon and AVANTS which coerced WEAKLAND into agreeing to testify against Petitioner; **(4)** that WEAKLAND was permitted to enter an "Alford Plea" to two counts of perjury and be given probation with the promise to terminate the probation if WEAKLAND behaved with the Judge's idea of proper conduct; **(5)** the charge of robbery with the use of a deadly weapon in the Krause murder was dismissed and **(6)** the State had written a letter on September 28, 1982, to the parole board recommending the Board's consideration of WEAKLAND'S testimony before the Grand Jury, when

GROUND THREE (CONTINUED)

SUPPORTING FACTS:

APP. 127

considering WEAKLAND'S parole application and other letters were written by various members of the police department and D.A.'S Office (**A.O.B.**, at P.21-22, **6/25/90**; ROA 2155; 558; 559-576).

8) On Appeal, Petitioner further presented evidence to the Court WEAKLAND committed additional crimes which he was not prosecuted for and the grand jury did not hear such as: **(1)** beating his wife, Gail Hodges causing her liver damage and two weeks hospitalization; **(2)** he hung his step-child by the neck with a belt and that a neighbor saved the child's life; **(3)** admitting to WEBB he murdered and buried a man behind his brother Leo Weakland's home in the Sunrise area; **(4)** he beat numerous prisoners while in jail and in prison and had been an agitator and **(5) he** was involved in an escape plot where deadly weapons were to be used by prisoners (**A.O.B.**, at P. 23-24, **6/25/90**).

APP. 128

Exhaustion of state court remedies regarding Ground 3:

- **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

__X__ Yes ___ No. If no, explain why not: N/A

- **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If no, explain why not: N/A

If yes, name of court: N/A date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

- **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes __X__ No. If yes, explain why: N/A

If yes, name of court: _____ date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

- **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: N/A

APP. 129

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 4

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fifth Amendment right to the United States Constitution, based on these facts: (State failed to prove each and every element of crimes beyond a reasonable doubt & there was insufficient evidence of accomplice testimony)

1) State failed to prove beyond a reasonable doubt that: **(a)** WEAKLAND met with Petitioner and MAXWELL at her home on **January 4,** 1974, a **Friday** night, between **8:00 P.M.** and **9:00 P.M.** (R.O.A. 2125-2128; 3012-3017; 4001-4006); **(b)** MAXWELL answered the door and Petitioner was present; **(c)** WEAKLAND was given $1,000. by MAXWELL and entered into a conspiracy with Petitioner and MAXWELL to murder Hilda Krause; **(d)** WEAKLAND **first** became aware of the location of the Krause residence from a **map** given to him by MAXWELL; **(e)** WEAKLAND **first** became aware that a security **wall** had to be climbed to gain entry into the Krause home; **(f)** WEAKLAND **first** became aware of the time Marvin Krause left for work and, **(g)** WEAKLAND **first** became aware that the murder must be done on one of two days, either a Monday or Friday (**A.R.B.**, at P. 29-30; **12/24/90**)

2) The Court was asked to carefully examine WEAKLAND'S cross-examination testimony at the May, 1989, trial that: "he met with MAXWELL and Petitioner on January 4th, 1974, a Friday night at approximately 8:00 P.M. and entered into a murder contract with them to kill Hilda Krause and first learned about the Krause location; wall had to be climbed and details of Krause's work schedule, when Counsel pressed WEAKLAND for a **final** determination as to what date of the **three** (3) different dates he previously testified to was the **actual** date this alleged murder contract occured" , when WEAKLAND testified as follows: Q. Do these refresh your recollection as to how long before January 14, 1974,

GROUND FOUR (CONTINUED)

SUPPORTING FACTS:

you allegedly met with Rosalie Maxwell and Frank LaPena at her Townhouse? A. Yes. Q. And how long was it? A. **Ten days.** Q. And that ten days was a **Friday;** was it not? A. .. **Yes, it was** (ROA P. 4003, Lns 12-25); Q. Thank you. I believe that it was at that time "at that meeting on January **4th**, Friday, January 4th, approximately **8:00 P.M.**", is when you received the "details", concerning who the victim was going to be, that he worked the early hours and that it should be done on a Monday or a Friday; isn't that **true**, sir? A. **Yes** (ROA P. 4005, Lns 13-25). On appeal, Petitioner presented **Weakland's impeached testimony** to the Court through defense witness, Ms. Jean Crow, Personnel Director of Caesars Palace, who identified MAXWELL'S **sign-in-work card** which conclusively established that **MAXWELL was at work** between **6:00 P.M. January 4, 1974 and 2:00 A.M. on January 5, 1974.** (A.R.B., at P. 30, 12/24/90; ROA P. 3995-3998).

3) On appeal, Petitioner argued Weakland's testimony regarding the Friday night, January 4, 1974 meeting with Petitioner and MAXWELL was totally impeached **by** WHITNEY's police reports, by the Lee and Lyons police reports and by AVANTS testimony of conversations with Officer WHITNEY and Costanza (**A.R.B.**, at P. 30, **12/24/90**; R.O.A. 3995-3997; 215-218; 239-240). Petitioner also requested the Court to carefully examine the "precise date" of WEAKLAND'S testimony, where Counsel methodically closed all of WEAKLAND'S escape routes regarding the precise date he claimed to have met with Petitioner and MAXWELL to have first received the details of Krause home and routine. (**A.R.B**, at P. 30, **12/24/90**; R.O.A. P. 4001-4006).

Petitioner further argued "In as much as the State has failed to prove that on January 4, 1974, a Friday night, between the hours of 8:00 P.M. and 9:00 P.M. an agreement was reached between Petitioner, WEAKLAND and MAXWELL for the murder of Hilda Krause and the State **failed to disprove** the defense testimony and exhibits which negated several of the essential elements of the crimes charged, the convictions cannot stand as a matter of law and Due Process

GROUND FOUR (CONTINUED)

SUPPORTING FACTS:

(A.R.B., at P. 33. Petitioner also argued WEAKLAND "lied" to the grand jury and the trial jury and "lied" to the trial court in his direct examination on May 9, 1989, approximately **48** times regarding Petitioner and **20** times regarding the involvement of MAXWELL in the murder of Hilda Krause (**A.R.B.** at P. 29-30; R.O.A. 2125-2128; 3012-3107; 4001-4006)

4) On appeal, Petitioner argued to the Nevada Supreme Court that WEAKLAND testified at trial he did not stab Hilda Krause in her neck area and did not believe he ever attempted to or in fact strangled Hilda Krause (A.O.B., at P. 34-35-36, **6/25/90; RAB-AOB**, at P. 66-67-68, 10/1/97)

5) WEAKLAND'S testimony that he gave the Krause **ring** to Petitioner and Krause **watch** to Costanza, was **disproved** when WEAKLAND'S testimony was impeached by State witness, WEBB, who testified that they disposed of the Krause watch and ring by throwing them in a **trash can.** WEBB'S testimony was corroborated by AVANTS who testified he searched Petitioner's home after he was arrested and did not find the watch or ring or any fruits of the crime (ROA 3977) and Costanza **denied** WEAKLAND gave him the watch, when AVANTS asked Costanza about such (**A.R.B.**, at P. 31, R.O.A. P. 3981-3982).

6) WEAKLAND gave false testimony to the trial court when he claimed: (a) he told Costanza about Petitioner's involvement in the Krause murder scheme; (b) that Petitioner **had hired** him to murder Hilda Krause; (c) that Joey Costanza **knew** Petitioner and, (d) Costanza had asked him about Petitioner **numerous** times **when** WEAKLAND had visited the "Little Italy Restaurant, as the trial judge **read** into the **record a letter** received from Costanza, with a **copy mailed to Mr. Harmon**, which stated in part, "... In regard to Frank LaPena, the convicted murderer, **I do not know him, never met him** and **if I passed him on the street, I would not know him** . (**A.R.B.**, at P. 31-32, **12/24/90**; R.O.A. P 4279; 4310-4312; 3074-3075).

7) WEAKLAND told inmates, Edward Eckert, Bernard Ybarra and Charles

GROUND FOUR (CONTINUED)

SUPPORTING FACTS:

APP. 132

Cooper, that marvin Krause had **hired** him to kill his wife, and that Petitioner did not know anything about the murder plot also told Eckert he **hated** Petitioner and WEAKLAND testified falsely on May 18, 1989, when he claimed he had not told Eckert that he did not like Petitioner and never discussed the Krause murder with inmates Eckert, Ybarra or Cooper because that was taboo (**ARB**, at P. 32, **12/24/90 ROA** 4021-22;4026;28;46;49; Petitioner argued on appeal, State failed to prove beyond reasonable doubt every element of the crimes for which he was indicted **A.R.B.**, at P. 32 12/24/90.

8) The record is silent of "**any evidence**" of Petitioner being a member of the murder conspiracy in **December, 1973**, and is "**void**" of any competent evidence of any murder conspiracy involving Petitioner in January, 1974, **ARB** P. 38, **12/24/90**

9) Petitioner presented evidence before the trial and appellate court that a conspiracy to rob the Krause residence was first born in "early December 1973, between WEAKLAND, BOUTWELL and WEBB, and that Petitioner was not a part of that conspiracy and the time of WEAKLAND'S claim of a conspiracy was clearly impossible (**A.R.B.**, at P. 37-38, **12/24/90**; R.O.A. 215-218; 239-240; 3967; 97; 3973; 1047)

10) The Nevada Supreme Court itself held they recognized in their 1983, Mandate Order the serious contradictions of WEAKLAND and Costanza's versions of the murder and stated that WEAKLAND'S testimony **before the** grand jury and his **prior** testimony in the prior proceedings were inconsistent with Costanza's statements to police as to the real parties involved in the Krause murder (**A.O.B.**, at P. 25-26, **6/25/90**).

11) At trial and on appeal, Petitioner asserted that there was insufficient legal corroboration of WEAKLAND'S testimony to sustain a conviction such as:

a) Petitioner and MAXWELL were never connected to the proceeds of the Krause robbery;

b) **N**o corroborating evidence that WEAKLAND gave the Krause **ring** to Petit-

SUPPORTING FACTS:

ioner. State did not link Petitioner to the Krause ring via WEBB who said they threw the watch and ring into a garbage can and Avants searched the petitioner's house and found no ring or watch(**A.O.B.**, at P. 38, **6/25/90**)

c) No corroborating evidence that WEAKLAND received a hand drawn map from MAXWELL on the 4th of January, 1974, which Gail Weakland could not link to Petitioner in any way (**A.O.B.**, at P. 38, **6/25/90**).

e) No corroborating evidence that WEAKLAND received $1000.00 from MAXWELL on January 4, 1974 between 8:00 & 9:00 P.M. . WEAKLAND told Gail Weakland he (won the $1,000.00 gambling) . Both WEAKLAND and GAIL WEAKLAND admitted he was a heavy gambler who borrowed money from Bill Underwood and C.I. Joey Costanza. What Gail Weakland did with the money given to her by WEAKLAND in no way ties petitioner to this money or these crimes (**A.O.B.**, at P. 37-38,**6/25/90**)

f) Irwin Fish's testimony cannot be used to corroborate WEAKLAND'S as Fish's testimony was stricken as a matter of law by Justice of the Peace B. Mahlon Brown who factually determined Fish's testimony was incredible and underserving of believe (**A.O.B.**, at P. 26; 29 & 40, **6/25/90**; **A.R.B.**, at P. 35, **12/24/90**)

12) On appeal, Petitioner argued the alleged conspiracy had never been independently shown to exist and the indictment and subsequent conviction were not lawfully obtained (**A.O.B.**, at P. 40, **6/25/90**)

APP. 134

Exhaustion of state court remedies regarding Ground 4

▸ **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

X Yes ___ No. If no, explain why not: N/A

▸ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

___ Yes X No. If no, explain why not: N/A

If yes, name of court: N/A date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

▸ **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes X No. If yes, explain why: N/A

If yes, name of court: _____ date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

▸ **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: N/A

APP. 135

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 5

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fifth Amendment right to the United States Constitution. based on these facts: (The District Court restriction of the cross-examination of Gerald Weakland deprived Petitioner of a fair trial)

At trial the prosecution attempted to lend respectability to WEAKLAND by implying that he now possed good values and wanted to do what was right for himself and his family (R.O.A. P. 3051, Lns 1-12) Since the evidence against Petitioner had never been considered overwhelming and WEAKLAND had recently obtained another felony conviction for a brutal attack upon a prison supervisor, Petitioner had a right to examine WEAKLAND regarding his role in the murder of inmate Lloyd Paulette in order to determine WEAKLAND'S propensity to kill people simply for the pleasure of taking life without the expectation of financial reward. The jurors were entitled to hear all facts before them concerning WEAKLAND'S character, reputation and WEAKLAND'S malignant and abandoned heart to wilfully and joyfully commit shocking crimes to others, including his wife, stepchild, and several jail and prison inmates.

On appeal, Petitioner argued the trial court abused its discretion in restricting Petitioner's cross-examination of WEAKLAND into his credibility, interest and "values" and the limitation violated Petitioner's right to confront his accusers. (A.R.B., at P.40-41; 12/24/90).

APP. 136

Exhaustion of state court remedies regarding Ground 5:

- **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

_X_ Yes ___ No. If no, explain why not: N/A

- **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

___ Yes _X_ No. If no, explain why not: N/A

If yes, name of court: N/A date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

- **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes _X_ No. If yes, explain why: N/A

If yes, name of court: N/A date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

- **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: N/A

APP. 137

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 6

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fifth Amendment right to the United States Constitution, based on these facts: (Trial Court refused to allow a jury instruction directly relating to Petitioner's theory of defense which was supported by substantial evidence)

Petitioner requested and the trial judge denied defense Jury Instruction No. 101, which read: "Ordinarily, the divorce of a testor revokes every beneficial devise, legacy, or interest given to the testor's former spouse in a will executed before the entry of the degree of divorce." Petitioner argued the motive of monetary gain was made an issue by the State which was not only denied by Petitioner, but also, Petitioner showed that Marvin Krause had a much more realistic motive for murdering his wife than Petitioner could possibly had (**A.R.B.**, at P. 42, **11/24/90**).

Petitioner presented substantial evidence regarding his theory of defense to support his requested jury instruction such as:

1) The contents of Metro Intelligence Officer Michael Whitney's C.I. witness report where Costanza details the admissions made in the presence of WEBB and BOUTWELL, Refer Ground Three, Paragraph 1, P. 7, cited above, (**A.R.B.**, at P. 42-43, **12/24/90**)

2) The testimony of Marvin Krause at WEAKLAND'S March, 1974, preliminary hearing where Mr. Krause testified: **a)** he did not call out to his wife or **aid** her after WEAKLAND and BOUTWELL left the crime scene; **b)** he **did not** touch, bend over or attempt to determine the severity of his wife's injuries (R.O.A. 3761-3762, **A.R.B.**, at P. 43, **12/24/90**)

3) Mr. Krause told Metro Officer Robert Keiser that his wife had **been hurt**,

SUPPORTING FACTS:

and upstairs and **knocked out** and made this admission despite the fact Hilda krause "had a **knife** sticking out in **plain view** out the mid-line of her back"; and he did not even telephone for an ambulance to rush his wife to a hospital (R.O.A. 3761-62-63; 3768; 3280; **A.R.B.**, at P. 43, **12/24/90)**

4) Judge Reynolds, Mrs. Krause's son by a former marriage testified his mother indicated she intended to divorce Marvin Krause and that if she divorced him he would not have received monies through her estate. Her death **before** a divorce enabled Marvin Krause to inherit a sizable estate. (**A.R.B.**, at P. 43, **12/24/90**; R.O.A. 3701-3709)

5) Gail Weakland's testimony that WEAKLAND borrowed her car "two days prior to the murder" because he had to "meet someone **very early** in the morning before he left for work because he had a job to do for him." (**A.R.B.**,at P. 43, **12/24/90)** See also, **A.R.B.**, at P. 36 "Marvin Krause's work schedule called for him to depart his home at **4:30 A.M. to 5:00 A.M.**, whereas Petitioner's work schedule was at **8:00 A.M.**).

6) The testimony of Mrs. Carol Campbell, Krause's next door neighbor, was read into the record that during the summer of 1973, Mr. Krause had a young show-girl type of woman frequently visit him while his wife was out of town and this girl was not MAXWELL (**A.R.B.**, at P. 43-44, **12/24/90**)

7) WEAKLAND confessed to prison inmates EDWARD ECKERT, BERNARD YBARRA and CHARLES COOPER that Marvin Krause had hired him to kill his wife(**A.R.B.**, at P. 44, **12/24/90**). See also, Ground Three, Paragraph 5, P. 7A, cited above)

8) Marvin Krause made several other admissions of his **hatred for his wife**, and stated it was a shame Hilda Krause had not broke her neck instaed of her arm when she had previously fell down the stairs of their marital home (**A.R.B.** at P. 44, **12/24/90**)

APP. 139

Exhaustion of state court remedies regarding Ground 6:

▸ **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

X Yes ___ No. If no, explain why not: N/A

▸ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

___ Yes X No. If no, explain why not: N/A

If yes, name of court: N/A date petition filed / /.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

▸ **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes X No. If yes, explain why: N/A

If yes, name of court: N/A date petition filed / /.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

▸ **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: N/A

APP. 140

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 7

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my **Fifth** Amendment right to the United States Constitution, based on these facts: (Trial Judge exercised actual bias and prejudice towards Petitioner prior to, during and after trial denying Petitioner his constitutional right to a fair and impartial trial)

1) Prior to trial, on October 22, 1985, the Nevada Supreme Court issued an Order **mandating** that there were to be no financial restraints placed on the defense which would interfere with their efforts to obtain the testimony of C.I. Joseph Costanza (**APPELLANT'S SUPPLEMENTAL BRIEF**, at P. 8, **10/11/90**)(**A.S.B**)

2) On March 17, 1987; the trial Court examined, reviewed, intermeddled and then executed his "own" **oral** orders against the doctrine and law of the case as set by the Nevada Supreme Court October 22, 1985 , mandate order that no financial restraints were to be imposed upon Petitioner to depose the C.I. Costanza where the Court ordered: "Insofar as any other items, I will not allow one sou (sic) to be spent on Mr. Costanza until such time there is a showing that the Uniform Act is not enforceable in that state." "FURTHER, I'll not spend another nickel on Mr. Costanza to have Mr. Wysocki to go back to get him"., (**A.O.B.**, at P. 9, **6/25/90**; **A.R.B.**, at P. 3, **12/24/90**).

3) On April 21, 1988, the trial court again stated it would not undertake to give Petitioner's defense another dime to get the C.I.

4) On October 18, 1988, the trial court ordered that Petitioner, his counsel and investigator, **were now precluded from even contacting C.I. Costanza,** when the court ordered: "Mr. Harmon, I am denying any attempt by them to mess with Mr. Costanza." On appeal, Petitioner argued Judge Foley's order contravened the appellate court's previous **orders** and further actually hindered

GROUND SEVEN (CONTINUED)

SUPPORTING FACTS:

APP. 141

the **access** by the defense to the only witness who could really impeach WEAKLAND. **(A.O.B.**, at P. 9, **6/25/90**; **A.R.B.**, at P. 8, **12/24/90)**

5) On November 22, 1988, the trial court again defied the previous mandate orders, when the court issued a "written order" denying financial investigative funds to Petitioner to obtain the presence and testimony of the C.I. for said trial, and, also denied financial funds for Petitioner to obtain his other two out-of-state witnesses which was against the previous order issued by Judge Michael Wendell.

6) On May 8th, 1989, the trial court denied Petitioner **access** to obtain Costanza's testimony, and, again on May 9th, 1989, the trial judge signed an order stating: "IT IS FURTHER ORDERED that none of the monies approved herein may be used for the purpose of locating JOSEPH COSTANZA, or in any way producing Mr. Costanza as a defense witness."

7) Prior to and after the May, 1989, trial, the district judge ordered the Petitioner to submit personal financial statements "from 1975 to the present date" (ROA 1743 & 175--1965) as the judge implied he wanted Petitioner to pay for attorney representation out of his own pocket. On May 1, 1989, the judge accused Petitioner of falsifing his personal financial statement, despite, the court knowing full well Petitioner was in prison during a substantial portion of the time and, after the trial, the district judge continued his attack on Petitioner contending said financial documents Petitioner provided were ludicrous (ROA P. 1786-1787; 4251, 11. 10-19; **(A.S.B.**, at P. 9, **10/11/90)**

8) **The** district judge assisted the prosecution by imposing objections on behalf of the State even though the State had not verbalized an objection and Counsel had to respond to the way the court kept interceding on behalf of the State (ROA P. 4029-4033) and further, the court ordered the State to file a response to a defense motion for investigator fees and for attendance **of out of state witnesses** after the State had ignored the motion and not bothered to

GROUND SEVEN (CONTINUED)

SUPPORTING FACTS:

APP. 142

to respond to said motion where the court stated to Mr. Harmon: "**I need some opposition to these motions then.**" (**A.S.B.**, at P. 9, **10/11/90**; **A.O.B.**, at P. 9, **6/25/90**).

9) On appeal, Petitioner argued Judge Foley having already **thwarted** the Petitioner's attempts **to secure** Costanza's attendance at trial, also improperly permitted the State to elicit and use the false and unchallengeable testimony of WEAKLAND regarding a purported relationship between Costanza and Petitioner even though the appellate court had already recognized the extreme importance of Costanza's testimony and the judge's refusal to approve additional funds to secure Costanza's presence at trial(ROA P. 3074-3075; **A.S.B.**, at P. 10-11, **10/11/90**) and Petitioner's constitutional rights to due process and a fair trial were violated.

10) The trial judge became incensed when he judicially recognized that defense witness, Ms. Jean Crow, **impeached** WEAKLAND'S testimony regarding the **date, time, and place** of the alleged meeting with Petitioner and MAXWELL to hire him to commit a homicide and chastized defense counsel for pursuing the **actual date** of the purported meeting when the court stated:"The other thing you have now changed the testimony you elicited from him when you cross-examined him regarding **the date** when he went to see Rosalie Maxwell." The court judicially recognized Ms Crow's impeachment of WEAKLAND when he stated:"And am I to understand that you have testified to here is January 4th, 1974, that from 6:00 p.m. there was a sign in and 2:00 a.m. a sign out? THE WITNESS: Correct (R.O.A. P. 3997-98; **A.R.B.**, at P. 45-46,**12/24/90**)

11) **The** trial judge failed to make any rulings or instructions regarding clearly false testimony of WEAKLAND stating he told Costanza of Appellant's involvement in the Krause murder, when compared to Costanza's several denials

GROUND SEVEN (CONTINUED)

SUPPORTING FACTS:

of ever knowing or meeting Petitioner, or having any knowledge of WEAKLAND ever having any connection to Petitioner (**A.R.B.**, at P. 45-46, **12/24/90;** (R.O.A. P. 4311-4313)

APP. 144

Exhaustion of state court remedies regarding Ground 7:

- **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

__X__ Yes ___ No. If no, explain why not: N/A

- **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

___ Yes __X__ No. If no, explain why not: N/A

If yes, name of court: N/A date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

- **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes __X__ No. If yes, explain why: N/A

If yes, name of court: N/A date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court?___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not: N/A

- **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: N/A

APP. 145

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 8

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Sixth Amendment right to the United States Constitution, based on these facts: (Petitioner did not receive effective assistance of counsel at trial and on appeal)

1) Prior to Petitioner's May, 1989, trial, he met with both his trial counsel and requested they interview and issue subpoena's on defense witnesses: Rosalie Maxwell; Gary E. Gowen, ESQ.; Melinda Swerigen; Judge Addelair Guy; Justice E.M. Gunderson; Anthony Bruno; Otis McClinton; Tillman Banks; Metro Lt. Hal Miller; Camille Dixon; Brian Clayton; inmate Nathan Kimmel & Freddie Walker; Nurse Haley; Judith Hill, ESQ.; Frederick Pinkerton ESQ.; and Michael Wysocki, Investigator. Petitioner also requested counsel to have Mr. Wysocki check the records at the County Clerks office for the years 1973-1974, to provide evidence MAXWELL never initiated "any divorce" proceedings against her estranged husband, Donald Maxwell (Petition for P.C.R. NRS 177.315) at P. 67-68, filed June 3, 1993).

2) On June 3, 1992, Petitioner filed a Petition for post-Conviction Relief (P.C.R.) pursuant to NRS 177.315, which was denied by the District Court without an evidentiary hearing (E.H.). On November 24, 1993, in an order of remand, the Nevada Supreme Court remanded the case back for an E.H. citing in its Order Petitioner claimed the following: (1) WEAKLAND had a secret agreement with state law enforcement officials; (2) WEAKLAND committed perjury when he gave moral transformation testimony; (3) C.I. Costanza had information connecting WEAKLAND and Marvin Krause to the murder of Hilda Krause; (4) The state illegally suppressed vital evidence that connected Marvin Krause with the murder; (5) Costanza had a secret agreement with state

GROUND EIGHT (CONTINUED)

SUPPORTING FACTS:

law enforcement officals; (6) state law enforcement officials committed perjury when they stated that they did not conceal evidence relating to Costanza; (7) appellant was denied his right to effective assistance of counsel; and (8) the reasonable doubt instruction which was given during the trial was constitutionally defective. The Court then held and made a factual finding when they concluded: "Having reviewed the record on appeal, we conclude that appellant's petition for P.C.R. raises claims **supported by specific factual allegations** which, if true, **would entitle appellant to relief.**"

3) The E.H. was held from October 16, 1995 to October 20, 1995, by the Honorable Gene Porter. At the conclusion of the E.H. both parties filed Post-Hearing Briefs. Petitioner Post-Hearing Brief contained the following grounds:

1) LaPENA did not receive effective assistance of counsel at trial and on direct appeal;

2) LaPENA was denied due process of law and a fundamentally fair trial (cumulative error) (a) A conflict of interest existed with respect to the trial judge and the reluctant witness Costanza; (b) The D.A.'S office interfered with C.I. Costanza; (c) Violation of the Order of the Nevada Supreme Court; (d) Use of false moral transformation testimony of WEAKLAND.

3) The Court should grant the Motion to Dismiss filed by LaPENA:

4) The State withheld Brady material from the defense and violated the mandate of the Nevada Supreme Court: (A) The contents of interview conducted by Chuck Lee in New Jersey that lasted "several hours" according to the memorandum prepared by Lee; (B) The contents of the interview in Florida between Lee and Costanza; (C) Contents of interview, taped and **handwritten statement** from WEAKLAND concerning Costanza ; (D) Failure to reveal **additional favors** done for WEAKLAND. On August 16, 1996, the District Court issued an Order granting the Petitioner's Petition for P.C.R.

GROUND EIGHT (CONTINUED)

SUPPORTING FACTS:

APP. 147

4) Prior to agreeing to testify against Petitioner before the 1982 grand jury and second trial, WEAKLAND demanded that the State agree not to write any more negative letters to the parole board and a written agreement was prepared and signed. These letters contained "specific derogatory" information about WEAKLAND and were the inducements for him to again change his story and testify against Petitioner.

Trial Counsel was aware of the new deal struck by WEAKLAND for his testimony and had possession of the written documentation, and at the E.H. he could not offer any explanation as to why he could not use the information during his cross-examination and Counsel did not ask a single question to WEAKLAND concerning his grand jury deal and no effort was made to **introduce** the letters that were the subject of the written agreement with the D.A.'S Office (RESPONDENT FRANK LaPENA'S ANSWERING BRIEF & CROSS-APPELLANT'S OPENING BRIEF, at P.15; 38-39 (RAB-AOB, **10/1/97**;5 AA 899;904-05; 16 ROA 3006-3105)

5) Counsel Gary Gowen, who was appointed to represent Petitioner after the case was reversed in 1982, and spent approximately 5 to 6 years as Counsel for Petitioner until removed from the case testified at the 1995 E.H. he would **have** used the agreement reached with the D.A. about the "**poison pen**" letters at trial and could think of no strategic reason not to use such information at trial (RAB-AOB, at P. 28, **10/1/97**; 7 AA 1222).

6) The Findings of Fact by the trial court specifically found that: "13" Evidence was available to trial counsel to impeach ... WEAKLAND as he had once again negotiated with the State for his testimony and again changed his testimony to receive a benefit. Trial counsel, Lamond Mills, admitted knowledge of the arrangement with the State and could articulate no strategic reason for not using the impeachment material. Due to the crucial nature of WEAKLAND'S testimony this failure had a greater impact than it would have had for a lesser important witness." (RAB-AOB, at P. 38, **10/1/97**; 9 AA 1579).

GROUND EIGHT (CONTINUED)

SUPPORTING FACTS:

APP. 148

7) On appeal, Petitioner argued these findings by the District Court were fully supported by the record, and "**not even addressed by the State**" in its Opening Brief.

8) Trial Counsel failed to recuse the Honorable Judge Thomas Foley despite a clear case of a conflict of interest and expression of animosity towards the defense as follows:

a) C.I. Costanza retained Counsel George Foley to represent him in Nevada sometime "**after**" his arrest and release on the material witness warrant in Florida;

b) George Foley was the brother of Judge Thomas Foley who was hearing Petitioner's retrial;

c) Judge Foley subsequently heard motions and issues concerning efforts to locate and interview Costanza and uniformly ruled against the defense;

d) Petitioner asked both Counsel Mills and Carter to recuse Judge Foley when he found out his brother George Foley was Costanza's attorney;

e) Counsel Gary Gowen also informed both Mills and Carter of his concerns about Judge Foley and suggested they recuse the judge;

f) Counsel Carter admitted at the October 1995, E.H., that the conduct of of Judge Foley in front of the jury during trial **affected** his ability to render effective representation for Petitioner; (RAB-AOB, at P. 25-26; 38-39,**10/1/97**)

g) Judge Foley had refused further funds on Costanza in violation of the Nevada Supreme Court order, and most important issued an order **denying the defense and Petitioner "access to Costanza as a witness for Petitioner at his trial"**;

h) Counsel Gary Gowen testified at the October 1995, E.H., after learning Costanza hired George Foley, he contacted George Foley and Foley told him that C.I. Costanza **would never agree to be interviewed privately**, and that "any interview would have to be **arranged** through **'Mel Harmon'**"; (RAB-AOB, at P. 26,

GROUND EIGHT (CONTINUED):

APP. 149

SUPPORTING FACTS:

10/1/97; 7 AA 1189; 1191-92; 8 AA 1332). Petitioner argued in his Post-Hearing Brief at P. 55, **2/6/96** , Counsel erred by not asking for the disqualification of Judge Foley when more than sufficient factual and legal cause existed to do so and Petitioner's prospects for prevailing at trial were severely impacted by the error of Counsel in this regard.

9) Counsel failed to discredit the **moral** transformation testimony given by WEAKLAND at the second trial when the State asked him questions concerning his values as to why he was testifying today and WEAKLAND responded that since his family stuck by him through this whole thing he owed that to them and wanted to do what's right. Evidence of WEAKLAND'S **recent past** was not fully and properly utilized to impeach WEAKLAND'S testimony as follows:

a) In Petitioner's 1992, P.C.R. Petition, he submitted evidence obtained from Investigator Anthony Pitaro, to the trial court **and on appeal**, WEAKLAND had a credit line at Bally's Grand Hotel in Reno, NV, that was **suspended** in **June 1989**, for issuing bad checks with insufficient funds while gambling at said hotel and that WEAKLAND issued **five** (5) **additonal bad checks** totaling **($4,170)** at the said Hotel in 1990.

b) Testimony at the October 1995, E.H., showed WEAKLAND while on parole had written bad checks or markers at Bally's in Reno and had a bad customer's check at the Bonanza casino from **April 4, 1989**, that was still outstanding, (RAB-AOB, at P. 43-44, **10/1/97**)

c) Daureen Weakland testified WEAKLAND drank alcohol even thought it was violation of his parole;

d) That WEAKLAND stole a shotgun while on parole;

e) That WEAKLAND **had written** "bad checks" that "she" had to cover for him;

f) **That** an incident of domestic violence occurred between her and WEAKLAND'

g) In March, 1994, WEAKLAND was charged with battery with use of a deadly weapon and robbery and subsequently acquitted (RAB-AOB, at P. 13, **10/1/97**)

GROUND EIGHT (CONTINUED)

SUPPORTING FACTS:

APP. 150

h) That WEAKLAND while in prison would occasionally break into Dr. Mace Knapp's office, in his absence, and make long distance phone calls and, that **one of the numbers was the "District Attorney"**. (RAB-AOB, at P. 28, **10/1/97**)

No questions were asked to impeach the moral testimony given by WEAKLAND as the reason he was testifying for the State. Substantial evidence existed to show that his **values** had not changed and that therefore his change of values could not be a reason for his testimony(RAB-AOB, at P.43-44,**10/1/97**)

Specific evidence was available to show WEAKLAND was first paroled in 1988 and he went right back to his lifestyle of drinking and gambling and up to and including the time of the E.H., WEAKLAND'S behavior had not changed as he was fairly constantly in trouble with the law (5 AA 925; 876-881).

The trial court **found** that an investigation into WEAKLAND'S recent past **prior** to his trial testimony would have revealed significant information to **impeach** WEAKLAND at trial. That WEAKLAND'S activities in prison and while on parole could have established that he could **not be believed**, and without the jury believing substantial portions of the testimony of WEAKLAND, LaPena **could not have been convicted.**

10) On appeal, Petitioner argued the Findings by the District Court that should have been impeached by the incidents recently occuring before his testimony and while on parole **is fully supported in the record** and the Findings and Order of the District Court should therefore not be disturbed (RAB-AOB, at P. 44, **10/1/97**)

11) When questioned by Counsel David Schieck, at the 1995, EH that related to Weakland's May, 1989, trial testimony that his **values** had changed and that's why he was testifying, Petitioner testified that:

a) He had personal knowledge of what Weakland's "values" had been while in prison and that Weakland's values had not changed;

b) Weakland worked for the Aryan Warriors in that he beat up people for them

SUPPORTING FACTS: APP. 151

and that's what he loved to do;

c) Weakland was the biggest drug dealer at NSP;

d) Petitioner had obtained an affidavit from inmate Freddie Walker, who would have testified he sold drugs for Weakland to the Blacks and in return Walker received free drugs; Weakland sold drugs to the whites;

e) When pressured by the Aryan Warriors they wanted a cut of Weakland's dope business, set them up with drugs and then snitch them off. (**RAB-AOB**, at P.30, **10/1/97**)(8 AA 1309)(LaPENA E.H. testimony at P. 624-625).

12) Petitioner testified Weakland received favorable treatment in prison one of which was contained in Weakland's **C-File** where on or about May 17, 1980, Weakland was taken before a **Special Classification Hearing** and found **guilty** of assaulting inmate Ron Dean Smith, yet not charged for that crime, however another inmate John Layton along with Eddie Eckert were. That when Counsel Carter and Mills received Weakland's C-File "they didn't even look at it", just gave it to Petitioner to review. And, when petitioner told Counsel Carter Eckert was going to testify at the trial Weakland was his accomplice in the Ron Dean Smith assault, "Carter didn't go anywhere near that testimony before the jury". (LaPENA E.H. testimony at P. 622-623)

13) Detective Chuck Lee testified he was aware that Weakland did get into trouble while he was in prison and that he was charged with something (6 AA 1054; 1058). Lee **might** have sent a letter to the prison in support of Weakland (6 AA 1054). Lee **might** also have made the authorities aware that Weakland had assisted or cooperated in cases (6 AA 1056) (**RAB-AOB, at** P. 19, **10/1/97**).

14) Counsel Gary Gowen testified he had done extensive background investigation on Weakland through the Department of Prisons (7 AA 1219) and he had determined that evry time Weakland got himself in trouble he would **run** to the administration for protection. (**RAB-AOB,** at P. 28, **10/1/97**).

15) Petitioner testified he spent a great deal of time with Counsel Gary Gowen

SUPPORTING FACTS: APP. 152

and gave him imput to witnesses that weren't called at his first trial that should have been called and were all available to corroborate his testimony (**RAB-AOB**, at P. 29, **10/1/97** ; LaPENA EH, testimony P.602) ;

a) That, Counsel LaMond Mills came into his case because Gary Gowen kept retiring all the time and he needed somebody who would be available (**RAB-AOB**- at P.28, 10/1/97, 8 AA 1285);

b) That, he asked both Counsel Mills and Carter as the trial was getting nearer if they had gotten some of the witnesses and that he wanted to testify and Mills & Carter made "no contact with any of the witnesses", who had given **prior** testimony that on the night WEAKLAND said he came over to Petitioner's house with WEBB; came into the house; talked for about 5 minutes to Petitioner and then Petitioner left with WEAKLAND and WEBB to go to the Hacienda Hotel and show them Mr. Obenauer's car, **all** these witnesses had testified ... upon showing them pictures, "**WEAKLAND never came into Petitioner's house**", and when the Supreme Court reversed his case, they had clearly stated the alibi witnesses were very vital to his defense, (RAB-AOB, at P. at P. 29; 47; 52; **10/1/97**; LaPENA EH testimony at P.606-607);

c) That, he had discussions with Mills and Carter concerning **those witnesses** and with Mr. Gowen concerning **those** witnesses and Gowen **wanted** them to be at the trial and **to corroborate** his testimony (LaPENA EH testimony at P. 608-09);

d) On appeal, Petitioner argued, witnesses Camille Dixon, Brian Clayton, Richard Grisham, and two other neighbors would have directly refuted and supported LaPENA'S planned trial testimony (8 AA 1290). Carter and Mills **offered no explanation** on the failure to have these witnesses ready to corroborate LaPENA, (**RAB-AOB**, at P. 52, **10/1/97**); and also argued "The State in its Opening Brief at the first trial made a point that LaPENA had denied during his testimony at the first trial that he met Bobby Webb on November 23, 1973, outside his residence (Op Br. P 18)(**RAB-AOB**, at P. 52, **10/1/97**);

SUPPORTING FACTS: APP. 153

16) As to other witnesses not called by Counsel Mills and Carter, Petitioner testified and argued on appeal he described the importance and corroborative nature of the witnesses that should have been called such as:

a) Melinda Swerigan the Hacienda Hotel personnel records director, would have testified that on the ocassion that WEAKLAND claimed to get a payoff from Petitioner, WEAKLAND was actually there applying for a job (8 AA 1286-89). Counsel Carter could not recall any discussion concerning Swerigan as a potential witness (4 AA 745) and Mills could not remember the specifics about any witness except for the major players like Rosalie Maxwell (4 AA 792);

b) Witnesses Otis McClinton and Tillis Banks were present and would have testified Petitioner had loaned $50.00 to Gail Weakland and that it was not a part of an alleged payoff for the killin of Hilda Ktause and at the 1974 preliminary hearing Oscar Goodman made her **admit** that it was a loan. No strategy was offered by Carter, Mills, or the State for the failure to use these witnesses to corroborate portions of Petitioner's expected testimony before the trial jury (**RAB-AOB**, at P.29; 52, **10/1/97**; LaPENA EH testimony 602-03-04-05)

c) Geneva Blue, a close friend of Rosalie Maxwell and had been out on dates with Maxwell and Marvin Krause would have testified everyone in the whole group got away with everything except Frank who was in prison for something he didn't do, that it was Maxwell that had contracted for the murder;

d) Nurse Haley, to testify she was on duty at the emergency room and had knowledge of the money and jewelry on the person of Krause when he arrived at the hospital;

e) Private Investigator Michael Wysocki, testified at the October, 1995, EH, that he had interviewed a number of witnesses that he expected to be called at trial (6 AA 1117), including Geneva Blue, Anthony Bruno, Nurse Haley, and Swerigan (6 AA 1117-1127) and also believed that he would have been called to testify and had expected to testify and had discussed with Carter and

SUPPORTING FACTS: APP. 154

Mills his testimony and subject matters of his testimony. Wysocki's EH testimony also totally corroborated LaPENA'S EH testimony that he thought witnesses would be called to back up his testimony (RAB-AOB, at P.22-23;49-50, **10/1/97**);

f) Wysocki testified he observed that the relationship between LaPENA and Carter was not good as LaPENA thought Carter was completely unprepared and expressed that he thought that Carter was intentionally trying to undermine his defense (6 AA 1116-1117; **RAB-AOB, at** P. 23;48-49, **10/1/97**) ;

17) Petitioner testified at the EH, his relationship with Mills and Carter started out fine, but deterioriated with Carter when Carter said **"No"** after Petitioner asked him, "one day prior to the trial, if he had read all the **transcripts** and read the **prior statements** of the witnesses", and he was doing strickly the pleadings "that's it, that's my job, no more"; (**RAB-AOB, at** P. 29, **10/1/97**; LaPENA EH, testimony P. 610; 8 AA 1294); And, that he wasn't going to question any witnesses, **RAB-AOB**, at P. 29, **10/1/97**; 8 AA 1294;

a) Counsel **Carter** testified he may have told LaPENA that he was **not** going to read all the documents **because he wasn't being "compensated well enough"** and may have told LaPENA that he would only be doing the legal writing and **would not** be examining any witnesses (4 AA 725) **RAB-AOB**, at P. 8, **10/1/97**);

b) Petitioner testified he complained to Mills about Carter questioning witnesses at the evidentiary hearing in October, 1988, as Carter did not know anything about the case and did not know Carter would be questioning witnesses,

c) That, his relationship with Counsel Carter was horrible as they got into trial due to Carter not being familiar with key facts and Carter's refusal to cross-examine Chuck Lee on the issue about WEAKLAND'S testimony he called Petitioner from Lake Havasu on January 15; Carter refused to bring out anything about WEAKLAND'S "**motive**" for going to Lake Havasu; i.e., Chuck Lee generated a police report that at the "Flame Restaurant" he had WEAKLAND, LOU CARDINALE

SUPPORTING FACTS: APP. 155

and RICHARD WAYMIRE under surveillance and Chuck Lee knew WEAKLAND, CARDINALE and WAYMIRE had something going

d) That, after his 1974 preliminary hearing he called Lou Cardinale ; told Cardinale about Weakland's testimony that he called Petitioner at his house the day **after** the Krause homicide; asked Cardinale "How did WEAKLAND get his phone number because Petitioner **never** gave it to him?"; Cardinale said: "I **gave it to him and I'm the one who talked to Jerry Weakland**"; "Jerry called me to tell me that he found nothing suspicious about Waymire's wife. He **went** up there to do some surveillance on his wife (Waymire's) because he (Waymire) thought his wife was cheating on him"; Petitioner testified he thought that was extremely important to explain the phone call from WEAKLAND at Lake Havasu to his phone number ; that he kept asking Carter to bring this out, show Chuck Lee **his report**, show a connection that "they did know each other" so inferences could be brought out that WEAKLAND **had made the phone call to Lou Cardinale** and Carter ignored Petitioner's request to bring this out (**RAB-AOB,** at P. 29, **10/1/97**; 8 AA 1295-1297; LaPENA EH, testimony at P. 610-611-612-613);

e) Counsel Gary Gowen testified at the EH, if he had been trial counsel, there were a number of evidentiary areas that he would have covered that did not not come out during LaPENA'S trial (7 AA 1205-1229). He would have called witnesses that could have established the connection between Lou Cardinale, an individual named Waymire and WEAKLAND in order **to establish that it was Cardinale that WEAKLAND had called from Lake Havasu after the murder** (7 AA 1207-1208); that he would have also called Geneva Blue, Nurse Haley and Rosalie Maxwell and would have used Petitioner as a witness at trial and had talked to him about testifying on many ocassions (7 AA 1224) and he had no reluctance about testifying and wanted to from the very beginning (7 AA 1224), **RAB-AOB,** at P. 27-28, **10/1/97**);

f) Mace Knapp, a psychologist fromN Nevada State Prison had been called to

SUPPORTING FACTS: APP. 156

testify at the trial and Carter could not recall having any pre-testimony discussions with the witness (4 AA 747), **RAB-AOB**, at P. 10, **10/1/97**). On appeal Petitioner argued that the vast majority of Knapp's testimony was detrimental to his defense because Counsel Carter had not even bothered to conduct an interview with Knapp before he was put on the stand, when Knapp rendered his opinion as to Petitioner's witnesses Charles Cooper and Eddie Eckert, before the jury, that:"These people are convicted felons. I would not believe a word they said either." (**RAB-AOB**, at P. 40-41, **10/1/97**; 3 AA **476-477**; 9 AA 1507-08) ;

g) Petitioner testified as the trial date was approaching he kept telling Mills and Carter that he wanted to testify and kept asking about his other witnesses; that Mills and Carter did not think it was a good idea for him to testify and he did not want to get on the stand and look like a fool 'if no witnesses were called to corroborate his testimony ; that he expected Maxwell would be called to testify and was very surprised when she wasn't called, not learning that she wasn't going to be called until he was sitting at Counsel's table during trial, (**RAB-AOB**, at P. 29-30, **LO/1/97**);

h) Rosalie Maxwell testified that at the second trial she was willing to testify and thought she was going to be called as a witness, but the first thing she knew the trial was over and she hadn't been called (**RAB-AOP**, at P. 33, **10/1/97**; 8 AA 1427-28)

18) The October 10, 1996, Findings of Fact by the trial Court specifically found that: "14". LaPENA did not testify at his second trial although he had expressed a desire to do so to attorneys, Gowen, Mills and Carter. The failure to have witnesses available to corroborate the testimony of LaPENA resulted in his acquiescence not to testify. Thus, the failure of trial counsel to adequately prepare for trial resulted in LaPENA not testifying. **The Court finds that LaPENA was a credible, well spoken witness who would have**

SUPPORTING FACTS: APP. 157

significantly aided his own defense by testifying;

"15". Witnesses were available to testify at trial that would have corroborated LaPENA'S potential testimony, impeached the questionable testimony of Weakland, and have been of exculpatory nature. These witnesses include: Melinda Swerigan, Otis McClinton, Tillis Banks, Brian Clayton, Richard Grisham, Camille Dixon, Geneva Blue, Anthony Bruno, Nurse Haley, Mike Wysocki, and Rosalie Maxwell;

"16". The failure to properly interview and call the above listed witnesses at trial was prejudicial to laPENA'S defense. If these witnesses had been called at trial, substantial doubt would have existed as to LaPENA'S guilt of the charged offense and the result of the trial would have been different;

"17". Investigator Mike Wysocki had contacted and interviewed a number of the witnesses and expected them to be called to testify at trial. Trial counsel did not personally interview any of the listed witnesses with the exception of Rosalie Maxwell and could articulate no reason for the failure to interview the witnesses or call them to testify at trial. P. 4

19) Petitioner was prejudiced by the failure to procure the testimony of Joseph Costanza as a witness by his attorneys;

a) Counsel Gary Gowen, who was principly involved in efforts to obtain Costanza did not ever know thatNew jersey had a reciprocal law providing for the attendance of out of state witnesses (7 AA 1170);

b) Prosecutor Mel Harmon testified: "A. He wasn't very effective in obtaining the presence of Joseph Costanza because I am absolutely convinced that we could have procured the presence of Mr. Costanza, ... We could have got him here by using the correct statutory procedure." (8 AA 1401)(**RAB-AOB**, at P. 54-55, **10/1/97**).

20) On appeal, Petitioner argued this issue by stating "Information that should have been used by trial counsel through Costanza would have totally

SUPPORTING FACTS: APP. 158

impeached key witness Weakland in the following respects:

"1. That Bobby Webb did not learn of the contract to kill Hilda Krause until January 12, 1974 (1 AA 71). costanza told Whitney and **Gowen** that Webb was with Weakland **six weeks prior** to the murder when Weakland approached Costanza on the job (7 AA 1166-67);

2. That LaPENA gave him the information about Marvin Krause (1 AA 73). Costanza **told** Gowen that Weakland said the information on Krause came from an employee of Caesar's Palace (7 AA 1166-67);

3. That after the first of January , 1974 on a **Friday** he received a **map** of the Krause residence from LaPENA at Maxwell's townhouse and Krause's work schedule (1 AA 78). Costanza said that Weakland **already had the map** and **details** six weeks **prior** to the murder (7 AA 1166-67);

4. That Thomas Boutwell did not know of and was not solicited for the Krause contract until January 14, 1974 (1 AA 83-84). Costanza **identified both** Webb and Boutwell as being with Weakland when Costanza was solicited six weeks prior to the crime (5 AA 894);

5. That subsequent to the crime Weakland gave the Krause watch to Joey Costanza and that Costanza probably had an idea where the watch came from (1 AA 135). Costanza denied ever receiving anything from Weakland and that Weakland **owed him money** (6 AA 993; 998);

6. That Weakland had told Costanza that LaPENA wanted him to do a job and that Costanza **knew** LaPENA (1 AA 137). Costanza **denied knowing LaPENA** at all from the very first statement and never indicated that LaPENA was mentioned by Weakland (7 AA 1168);

The Findings by the District Court that Costanza's "appearance could have been arranged by the various counsel that represented LaPENA and that the failure to have costanza testify at trial was prejudicial to LaPENA'S defense" is totally supported by the record of the proceedings and by the previous

SUPPORTING FACTS: APP. 159

Orders of this Court. The State's argument concerning Costanza is totally without merit and the decision of the District Court should therefore be affirmed, (**RAB-AOB**, at P. 55-56, **10/1/97**);

21) The Findings of Fact by the District Court on this issue stated: "The testimony of Weakland would have been impeached **by the testimony** of Costanza in a number of respects, including the timing of the involvement of Webb and Boutwell in the scheme, the source of Weakland's knowledge, that Costanza received Krause's watch from Weakland, and that Weakland had told Costanza that LaPENA was involved. Establishing that Weakland **had lied under oath** concerning these matters would have made the remainder of his trial testimony all the more incredible." P. 6

22) Counsel Gary Gowen concealed crucial information/evidence from Petitioner, the Court and successor Counsel Mills and Carter concerning his conversation in 1983 with Joseph Costanza; (**RAB-AOB**, at P. 56-57,**10/1/97**)

a) Gowen testified he sent a letter asking Costanza to get in touch with him; it was essential he speak to Costanza; weeks later he received a call from Costanza, who informed him that he had no additional information to that given Whitney; He (Gowen) persisted in the conversation and learned that Costanza had been told of an elaborate plan to rob a rich guy some weeks before Christmas and that Weakland had further **shown** him an **outline** and **diagram** during their conversation; never heard of LaPENA; ...and said that **he had talked to Mel Harmon** (**RAB-AOB**, at P. 24, **10/1/97**; 7 AA 1165-66-67-68; 1176)

b) Gowen testified only after Petitioner's conviction did he reveal the information he elicited from Costanza to Petitioner; that he was really upset that he had been called at least as a witness in this case; and even concealed this information during the appellate process when he was assisting Counsel Carmine Colucci in the Petitioner's appeal (**RAB-AOB**, at P. 57-58-59,

10 1/97). On appeal, Petitioner argued "Clearly Gowen let LaPENA proceed to trial without providing important information about the case and his conversation with Costanza to trial counsel or the client. Performance of counsel Gowen was deficient and prejudiced LaPENA'S ability to receive a fair trial and a full and complete defense and the District Court's findings regarding same should not be disturbed (**RAB-AOB**, at P. 59,10/1/97)

23)The District Court's Findings of Fact on this issue stated:

"19". The Court finds that the conversation that Gowen reportedly had with Costanza provided impeachment information that could have been used against Weakland and went beyond the contents of the confidential informant reports that were admitted at trial;"

"20. The intentional failure by Gowen to document the contents of his conversation with Costanza and provide same to successor counsel was deficient performance that prejudiced LaPENA'S defense. These derelictions left LaPENA at the mercy of Gowen's memory as to the contents of the conversation with Costanza and hampered not only trial counsel but also the ability of LaPENA to establish his post conviction claims concerning Costanza";

"21. Gowen possessed information about LaPENA'S case that should have been provided to successor counsel and which successor counsel should have affirmatively sought out. This combined failure of communication and effort was prejudicial to LaPENA."

24). Proper preparation and investigation would have revealed the Marvin Krause-Jerry Weakland connection

a) During the evidentiary hearing, Petitioner was able to conclusively establish that Weakland had **lied** throughout the course of the various proceedings and was continuing in his **lies** about his involvement with Marvin Krause:

"Q. Now prior to January of 1974 had you ever met Marvin Krause?

A. **NO.**

SUPPORTING FACTS: APP. 161

Q. In fact, you testified at Mr. LaPena's trial that you had never met Marvin Krause, isn't that true?

A. **Yes.**

Q. And there's--You're not changing that testimony at this time?

A. **No.**

Q. And also in the statement that you gave on March 29, 1974, to the police, you also told them that you'd never met Marvi Krause before, is that correct?

A. **Yes.**

b) The testimony of Ted Martinez, an independent witness was that Weakland was well acquainted with the Krause's, when he testified, the Krause's asked to have Jerry wait on them and he helped Jerry Weakland wait on them.

c) On appeal, Petitioner argued if this case was properly prepared and the evidence submitted to the jury, LaPENA would not have been convicted. The State bases its case and theory of the case on the testimony of Weakland, and must rise or fall with his testimony. The evidence that was available to establish the Krause-Weakland connection and to refute the State's theory was bungled, hidden, lost and abandoned as the case proceeded through trial. The District Court heard the evidence , considered the demeanor and credibility of the witnesses and based thereon entered its Findings of Fact, Conclusions of Law, and Order. Petitioner then reminded the appellate court that many years ago they felt compelled to make the following comment that "We note with grave concern, however, the tenor of these proceedings against Petitioner. ... We urge the district attorney's office to insure the fairness of petitioner's trial, as well as his right to pretrial discovery, and to conduct itself with the impartiality and objectivity demanded by the office." LaPENA has not yet had the fair trial that the Constitution guarantees to every criminal defendant. The District Court could see it and entered the appropriate order. (**RAB-AOB** ,

GROUND EIGHT (CONTINUED)

SUPPORTING FACTS:

P. 59-60-61-62, 10/1/97)

25) The District Court's Findings of Fact on this issue stated: "25. Proper investigation and preparation would have revealed the connection between Krause and Weakland. Krause and Weakland worked in close proximity with each other at Caesar's Palace and the Court **finds that Weakland's claim he never knew or met Krause could and should have been impeached at trial.** Establishing this connection was critical for an adequate defense for LaPENA and would have provided both motive and opportunity for Weakland to have committed this crime without any involvement from LaPENA."

26) Additional Findings of Fact by the District Court included the following: "27. The Court finds that Gowen also failed to document and inform successor counsel concerning the results of his investigation into Weakland's prison activities which could have been used for impeachment. Gowen's performance in this regard was deficient. The Court also finds that the same information was available to trial counsel if they had pursued investigation and that their performance was also deficient, both of not getting the information from Gowen and for not independently discovering the same. This information was available from witness Mace Knapp, yet he was never interviewed prior to being placed on the witness stand to determine the nature and extent of his knowledge about Weakland."

APP. 163

Exhaustion of state court remedies regarding Ground 8:

▸ **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

___ Yes _X_ No. If no, explain why not: Not cognizable on direct appeal

▸ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus? P.C.R.

_X_ Yes ___ No. If no, explain why not: _____

If yes, name of court: Eighth Judicial District Court date petition filed 6/3/92.

Did you receive an evidentiary hearing? _X_ Yes ___ No. Did you appeal to the Nevada Supreme Court? _X_ Yes ___ No. If no, explain why not: _____

If yes, did you raise this issue? _X_ Yes ___ No. If no, explain why not: _____

▸ **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If yes, explain why: _____

If yes, name of court: _____ date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not: _____

If yes, did you raise this issue? ___ Yes ___ No. If no, explain why not: _____

▸ **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: _____

§2254-Form
eff. 1/97

APP. 164

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 9

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fourteenth Amendment right to the United States Constitution, based on these facts: (Motion to Dismiss on grounds Petitioner is factually innocent and is being illegally and unconstitutionally detained and imprisoned for a crime he did not commit)

1) After the Nevada Supreme Court on November 24, 1993, issued an Order of Remand for the District Court to conduct an evidentiary hearing, Petitioner on December 3, 1993, filed a Motion to Dismiss his Indictment and on December 21, 1993, filed a Supplemental Facts and Points and Authorities in Support of his Motion to Dismiss his Indictment at the Conclusion of his E.H. . The State responded that said Motion was connected to the Petitioner's P.C.R. Petition and thus could be considered by the court during pendency of the hearing. (**Appellant's Reply Brief & Cross-Respondent's Answering BRIEF ARB-CRAB**, at P. 3, **11/21/97**).

2) The December 3, 1993, Motion to Dismiss the Imdictment contained the following grounds: (1) that the Defendant was falsely charged, convicted and sentenced to prison for allegedly hiring Gerald Weakland to commit a murder that Gerald Weakland did not commit; (2) that the Defendant is factually innocent of this crime and is being illegally and unconstitutionally detained and imprisoned ...for a crime Defendant did not commit; (3) that the extraordinary circumstances of Defendant's conviction and sentence qualify him for a dismissal of his charges ... based upon pathologist,, Dr. James Clarke's scientific medical findings which overwhelmingly traversed Gerald Weakland's March 29, 1974, murder confession and subsequent testimony he murdered Hilda Krause, as well as evidence given to Defendant on July 3, 1991,

SUPPORTING FACTS:

by former Counsel Gary Gowen that connected ... Marvin Krause and Gerald Weakland together in the early December, 1973, planned proposed robbery and beating of Hilda Krause and her subsequent murder on January 14, 1974; (4) that the forensic facts in the case at bar support defendant's colorable claim of factual innocence. (Motion to Dismiss (**MTD**) , at P. 2-3, **12/3/93**; See also **RAB-AOB**, at P. 66, reference to MTD, **"1 RA 155-176", 10/1/97**).

3) On January 14, 1974, Hilda Krause was murdered at her residence located at 2995 Pinehurst Street, Las vegas, NV. (**MTD**, at P. 3, **12/3/93**; **ARB-AOB** P. 5)

On January 14, expert pathologist Dr. James Clarke performed a post-morten examination on decedent Hilda Krause and determined Hilda Krause had been:

(1) gagged in the neck by a **scarf** Dr. Clarke **found tied** around Hilda Krause's neck; See also, ROA P. 3828, Lns 7-10,

(2) received several deep **stab wounds on the right side of her neck** directly **behind** with the cutting wound; See also ROA P. 3830, Lns 1-10;

(3) received a ligature groove mark extending completely around her neck as a result of a **cord** or **rope** being **tightly applied** to her neck about a half inch "ABOVE" the cutting wound; See also ROA P. 3831, Lns 3-9;

(4) **strangled**; See also ROA P. 3832

(5) again stabbed **after** her throat was cut where she received additional stab wounds inside the same original wound or opening in her neck; See ROA P. 3834; **MTD**, at P. 2-3, **12/3/93**. See also **RAB-AOB**, at P. 5-6, **10/1/97**.

4) There were several police identification officers and **one** or **more detectives present** when Dr. James Clarke performed the autopsy examination on Hilda Krause on January 14, 1974, at Bunker Brothers Mortuary in Las Vegas, Nevada; **MTD**, at P. 3, **12/3/93**.

5) In his March 29, 1974, murder confession and subsequent testimony Gerald Weakland confessed that:

(1) He used a "single cord" to tie up Hilda Krause's hands and feet with;

GROUND NINE (CONTINUED)

SUPPORTING FACTS:

(2) She "did not" resist or struggle with him;

(3) That he hit her in the back of her head with his fist knocking her unconscious;

(4) That he **cut** her throat **"one time only"** from left to right;

(5) That he "did not" get one single drop of **blood** on himself even though he had both of his feet planted firmly over her shoulder's at the time he **cut** her throat;

(6) That he "did not" wait around to find out **if she actually died;**

(7) That he "did not" **strangle** her;

(8) That after he cut her throat he then stuck the knife in her mid-line back and immediately left her bedroom and the crime scene. **MTD**, at P. 4, 12/3/93; and WEAKLAND'S May 9, 1989, and May 18, 1989, trial testimony ROA P. 3078-3082-3083-3084; 4008-4009-10-11-12 Vol. XVI; and, **AOB**, at P. 34-35-36, in that WEAKLAND'S testimony conflicts with the testimony of his accomplices, with the testimony of the coroner and with his own prior statements and testimony, **6/25/90.**

6) Metro police officers' responding to the crime scene found Hilda Krause:

(1) With her hands and feet **"untied"**;

(2) Found, not one, but "two electrical cords" lying near her body and retrieved "three electrical cords" from the crime scene;

(3) Found **"blood splattered"** all over Hilda Krause's bedroom on the doorjam, bed sheets, lamp shade, base of the lamp, night stand and rug;

(4) Found gauze and a **"scarf"** wrapped around her neck and,

(5) Noticed Marvin Krause with "blood running down, not the back of his head" where he had been hit with a blunt instrument, but, instead, the right "front" part of his face and neck, **MTD**, AT P. 4-5, **12/3/93**

7) At Pages five (5) through eight (8) Petitioner submitted in his 12/3/93 Motion to Dismiss the facts are unrepelled WEAKLAND **never** confessed to:

(1) Untying the electrical "cord" from Hilda Krause's hands and feet before he exited her bedroom;

GROUND NINE (CONTINUED)

SUPPORTING FACTS:

(2) Using "two electrical cords" to tie up Hilda Krause's hands and feet;

(3) That he used three electrical cords" for use at the crime scene;

(4) Using a "cord or rope" on Hilda Krause's throat and applying it tightly around her neck about a ½ inch "above" the cutting wound;

(5) Having a **scarf** and using it to tie around Hilda Krause's neck;

(6) Stabbing Hilda Krause "several" times on the right side of her neck;

(7) Strangling Hilda Krause;

(8) Stabbing Hilda Krause directly behind and parallel to the one cutting wound;

(9) That he **again** re-inserted the knife into the **same** wound or opening of Hilda Krause's throat and commenced to **stab** her on the right side of her **neck** "more" than one time.

Petitioner also argued the State did not develope any positive evidentiary proof WEAKLAND committed the above-described acts upon Hilda Krause and in fact, the State **"accepted"** as **"true"** WEAKLAND'S confession **to only** those criminal/physical acts he described and admitted to he inflicted upon Hilda Krause. MTD, at P. 9, 12/3/93.

8) Petitioner submitted the State has never let WEAKLAND know his confession relating to the manner in which he stated he allegedly murdered Hilda Krause ... was not even close to Dr. James Clarke's scientific medical determination **"she died by other means that WEAKLAND confessed to."** **MTD**, at P. 10, **12/3/93.**

9) Petitioner submitted this case, turns on **WHO** the real person was, and is, who re-inserted that knife **again** and then commenced to stab her more than one time on the right side of her neck which caused her death, and WEAKLAND **"was not"** the person who re-inserted that knife again which resulted and caused her death and, the State and its agents have silently known this for nearly 20 years. **MTD**, at P. 11, Lns 1-9, **12/3/93** Petitioner further submitted, **He who** untied the cord from Hilda Krause's hands and feet; **He who** strangled her with a scarf or cord or rope; caused a violent **struggle** to occur; splatter

GROUND NINE (CONTINUED)

SUPPORTING FACTS:

blood all over her bedroom; and **He who** "after" WEAKLAND left Hilda Krause's bedroom and re-inserted the knife "again" and commenced to **stab** her more than one time on the right side of her neck , **"IS THE PERSON WHO MURDERED HILDA KRAUSE." MTD** , at P. 11, Lns 11-27, **12/3/93.** Petitioner also contended he presented concrete positive proof to the Court **"that person is the real killer of Hilda Krause." MTD** , at P. 12, Lns 14-22, **12/3/93.**

10) Petitioner submitted other factual evidence of innocence in his **12/3/93, MTD,** at P. 13-14-15-16-17-18 & 19, in that when Counsel Mills pressed WEAKLAN D for a **final** determination as to what **date** the **three (3) different** dates he testified he allegedly went over to Rosalie Maxwell's house and entered into an alleged contract murder between Petitioner and Maxwell, WEAKLAND stated it was **January 4th**, a **Friday night, at approximately 8:00 P.M.** and, that the **"documentary** and **factual"** evidence testified to by Ms. Jean Crow that Maxwell **signed** into work on **January 4th**, 1974, a **Friday** night at **6:00 P.M.** at Caesars Palace Hotel , and **signed out** of work at **2:00 A.M.** on January 5th, 1974, was insufficient to support the jury's conclusion , Petitioner, Maxwell and WEAKLAND had met at Maxwell's residence between 8:00 P.M. & 9:00 P.M., on **January 4th,** a **Friday night** and conspired into and entered into a contract murder with each other to murder Hilda Krause. The other evidence submitted by Petitioner was that on July 23, 1991, during a phone conversation with his former attorney, Gary Gowen, Gowen told Petitioner during a phone conversation in October, 1983, informant Costanza told Gowen: "Weakland told me that the person he was going to rob **is the person who told Weakland where he lived; what time he left for work; what days of the week it was appropriate to rob him;** that this **guy who** provided Weakland with **this** information **was an official** at Caesars Palace and **'THEY'** had planned this **together long before** December 1973.'" **MTD**, at P. 18-19, **12/3/93.**

11) The **MTD** , at P. 19-20-21, consisted of additonal evidence tending to link

GROUND NINE (CONTINUED)

APP. 169

SUPPORTING FACTS:

Marvin Krause to his wife's murder. Marvin Krause testified at WEAKLAND'S March 28, 1974, evidentiary hearing and from Pages 3760 to 3766, testified that:

(1) Upon releasing himself after being tied up, he immediately went into the big bedroom where his wife was lying and "plugged in the phone and immediately called the police;

(2) He **then** went **downstairs immediately** and stood in front of the doorway or the garage and waited for the police";

(3) He was **only a few feet away from his wife when he observed her body;**

(4) He "did not" **see any items** present about her body as she was lying there;

(5) He did not "**touch**" his wife or "**look**" **her over** or "**aid**" her or even "**call out to her**";

(6) He couldn't tell if his wife was tied up at that time **beause** "**he didn't take that close of a look nor did he hang around long enough to find out**";

(7) He was "unconscious" during the time of this crime after being hit in the "**back**" of his head with a blunt instrument.

12) GERALD WEAKLAND on **October 17, 1995,** testified at the evidentiary hearing before the Honorable Gene Porter, that:

(1) He had sliced Hilda Krause's throat "**once**" and **did not need to change that testimony**, EHT, at P. 246;

(2) He **did not stab her into the throat or neck area**, EHT, at P. 246-247;

(3) He **did not** take a **scarf** with him nor did he gag her with a scarf, EHT, at P. 247;

(4) He **did not put a ladies scarf around her neck** and was never advised by Chuck Lee , Beecher Avants nor Mel Harmon that a scarf was found around Hilda Krause's neck, nor was he ever asked by law enforcement individuals about the scarf that was placed around her neck, EHT, at P. 248;

(5) He **never knew of a scarf or anything about it** and in preparation for his **1974** preliminary hearing or **any** of the statements or testimony he's given in

GROUND NINE (CONTINUED)

SUPPORTING FACTS:

this case he has never seen the "autopsy report" and, **Lee, Avants nor Harmon** ever discussed the autopsy report with him, EHT, at P. 249;

(6) He used a telephone cord to tie up Hilda Krause's hands and feet with, but he **did not use that cord to Strangle** her with nor did he know that the autopsy report indicated there was a ligature groove mark, a choking mark, around her neck above where her throat was cut, nor did anyone ask him that when he gave his statement, EHT, at P. 250;

(7) He admitted when he gave his statement on **March 29, 1974, he didn't confess** he **strangled** Hilda Krause and no one involved in this case asked him to explain "the ligature markings" around her neck when he gave his statement, EHT, at 251;

(8) He reiterated his statement and testimony that he slit Hilda Krause's throat "**once**" and then stabbed her in the **back** and **that "was the extent of the cutting that he did with the knife**", EHT, at P. 251;

(9) He "**did not reinsert the knife again**" 'after' he cut her throat **one time**, nor did anyone ask him or told him Hilda Krause was stabbed on the right side of her neck, **until today**, EHT, at P. 253;

(10) Mrs Krause **did not struggle with him** nor did she **pull any "hairs"** from his head or Thomas Boutwell's and at all times in her presence they kept their stocking masks on, EHT, at P. 255;

(11) He did not get any blood on himself, EHT, at P. 255;

(12) He was wearing gloves but did not see any blood on them, he **did not scatter any blood about**, nor did the detectives talk to him about the blood they found scattered about the bedroom, he was never asked about the blood splatter, his **hair** or **struggle** and, that this was the "**first time**" he was asked those questions, EHT, at P. 257;

(13) He **did not untie Hilda Krause** and the **last wound he inflicted** on Mrs Krause **was** when he left the knife **in her back** and did not stick around to check if she was still alive, EHT, at P. 258;

GROUND NINE (CONTINUED)

SUPPORTING FACTS:

(14) No one during the time he gave his statement to the people involved in this case showed him a photograph of the Krause bedroom when the police arrived EHT, at P. 261. See also, **CROSS-APPELLANT FRANK LaPENA'S REPLY BRIEF,** at P. 5-6-7, **1/15/98.**

13) On Appeal, Petitioner directed the Court to the record where he cited in his argument that in December , 1993, he filed a pro per Motion to Dismiss the Indictment on the grounds that he had been convicted and sentenced on charges of hiring WEAKLAND to commit a murder that was not committed by WEAKLAND and showed the Court the evidence throughout the course of the various proceedings was **re-emphasized** at the evidentiary hearing, **RAB-AOB,** at P. 66, **10/1/97;** Petitioner arguedthe prior sworn testimony of Dr. Clarke made it abundantely clear that the injuries to Hilda Krause did not occur at the hand of WEAKLAND and, the confession and testimony of WEAKLAND **do not fit the murder of Hilda Krause, RAB-AOB,** at P. 68, **10/1/97.** The State's case therefore did not contain significant evidence of all the elements of the crimes to convict Petitioner, and if the testimony of WEAKLAND is to be believed **as the State urges,** then he **did not** kill Hilda Krause and Petitioner cannot be guilty of hiring him to do so, RAB-AOB, at P. 68-69, 10/1/97. Petitioner pointed out to the Court WEAKLAND testified in part at trial as follows:

"Q Did you simply cut her throat? Did you **stab** her or **cut** it?

A. I **cut** it.

Q. Did you take **one** cut?

A. **Yes.**" (1 AA 145) **RAB-AOB** , at P. 66, **10/1/97,**

And, at the evidentiary it was explored to be certain WEAKLAND was going to change his testimony and WEAKLAND testified "A. ... I slit the lady's throat. **I did not stab her in the throat.**" (5 AA 928-29) **RAB-AOB,** at P. 67, **10/1/97**

14) Petitioner again in his **1/15/98** Reply Brief presented to the Court the Merits of the Motion to Dismiss the evidence at the time of his trial,

SUPPORTING FACTS:

only some of which was presented to the jury, shows that he is factually innocent of the crime for which he was arrested and convicted. The testimony at the EH, confirmed that the State has not ever, and cannot prove a material element of the charges levied against Petitioner-that WEAKLAND **actually was the assailant that killed Hilda Krause.** The **facts** presented in the Motion to Dismiss and confirmed at the EH were **that someone other than Petitioner** hired WEAKLAND and either assisted him in the commission of the murder or committed the **fatal acts** himself, (**CROSS-APPELLANT FRANK LaPENA'S REPLY BRIEF**, CA-FL-RB, at P. 5)

WEAKLAND testimony at the evidentiary hearing **corroborated** Petitioner's Post-Conviction claim that he was factually innocent of the charges in the following respects:

(1) WEAKLAND reiterated that he had only sliced Hilda Krause's throat once. (This is contrary to the coroner's findings.);

(2) That he did not stab Krause into the throat or neck area. (This is contrary to the coroner's findings.);

(3) That he did not take a scarf with him nor did he gag Krause with a scarf. (This is contrary to the findings at the crime scene.);

(4) That he was never advised by any detectives or prosecutors that a scarf was found around her neck nor was he ever asked regarding same (5 AA 930);

(5) That he had never seen the autopsy report nor discussed the inconsistency between same and his stay with any of the detectives or prosecutors(5 AA 931);

(6) That although he had used a telephone cord to tie up Hilda Krause, he did not strangle her with the cord nor did he know that there was a ligature mark around her neck (5 AA 932);

(7) That Krause did not struggle with him nor pull any hairs from his head or that of Thomas Boutwell and at all times in her presence they kept their stocking masks on (5 AA 937); and,

(8) That he did not scatter any blood, nor did the detectives talk to him about

SUPPORTING FACTS:

the blood they found splattered about the bedroom and he was never asked about the blood splatter , his hair or struggle and that he had never been asked such questions prior to the evidentiary hearing. (**CA-FL-RB**, at P. 5-6-7, **1/15/98** 5 AA 939)

15) Petitioner also presented to the Court in his **1/15/98** Reply Brief CA-FL-RB, at P. 7-8-9 & 10 crucial information was developed during the post-conviction proceedings implicating Marvin Krause in the event such as having motive, opportunity, and ability to murder his wife Hilda Krause:

(1) Judge Reynolds , Hilda Krause's son by former marriage testified his mother indicated to him she had intended to divorce Marvin Krause; that Marvin Krause **could not** inherit monies or property under her will had a divorce been obtained; Her death **before** divorce enabled him to inherit a sizable sum.; Petitioner testified at the EH that he had read a letter that had been written by Marvin Krause to his wife Hilda, that, he did not want his wife to leave him; he had gambled away **all** of his money and was penniless (8 AA 1305);

(2) Rosalie Maxwell testified at the EH Marvin Krause stated it was a shame his wife had not broken her neck instead of her arm when she had previously fell down the stairs of their home (8 RA 1412);

(3) Opportunity for Marvin Krause to murder his wife occurred "**after**" WEAKLAND exited her bedroom and **left** the crime scene with Boutwell at which time **evidence** and **testimony** in the record shows Hilda Krause **was stabbed a minimum of six (6) times and strangled** by a scarf and cord or rope, **none of which WEAKLAND claimed responsibility** 5 RA 928-929; 933; and WEAKLAND testified he did not stick around to check if she was still alive 5 RA 940; The "**only**"**person**" present in the Krause residence **after** WEAKLAND and Boutwell left the crime scene was Marvin Krause; The evidence thus points to only one person in the Krause residence who attacked Hilda Krause **after** WEAKLAND **exited** the bedroom where **he left her tied up** and that person is Marvin Krause;

SUPPORTING FACTS: APP. 174

(4) Marvin Krause displayed his anger and temperment before Detective Avants that when Maxwell came back from Hawaii he was unable to locate her for several days and commented to Avants that "she was probably shacked-up with that goddam Frank" or words to that effect; He did not like Petitioner and told Maxwell when he sent her to Hawaii for a week in 1973, she could take anybody except Petitioner 8 RA 1435;

(5) Gary Gowen's affidavit/declaration identified as Exhibit J in LaPENA'S PCR Petition regarding a phone conversation Gowen had with eyewitness informant Costanza in 1983, states the following: "Weakland told him he had **personal knowledge** of the proposed victim's residential layout and work time schedule because the proposed victim was a **boss** at Caesar's Palace and Weakland had **known him a long time.**" ;

(6) This declaration by Mr. Gowen corroborated Ted Martinez's evidentiary hearing testimony that Weakland had personally known Marvin Krause for a longtime, i.e. 8 years **prior** to this incident and also Marvin Krause was a **boss** at Caesar's Palace i.e., Slot Department Manager and point owner;

(7) Petitioner testifed at the EH, that prior to his second trial he personally read a police report by a detective who had Marvin Krause under surveillance at Caesar's Palace and in that police report the detective indicated he was suspicious of Mr. Krause being involved in the murder of his wife;

16) Petitioner presented further information during the post conviction proceedings contained in his July 11, 1996 "LaPENA'S POST HEARING REPLY BRIEF" implicating Marvin Krause in the murder of his wife such as "KRAUSE MADE UNCANNY STATEMENTS THAT INDICATED HIS INVOLVEMENT IN HIS WIFE'S MURDER AND ACTED IN A BIZZARE AND SURPRISING MANNER.

(a) He did not give a complete and truthful statement on January 14, 1974, when he called the LVMPD Metro Dispatcher and said **he** was the victim of an

armed robbery and "assault with hands and fists". Neither Weakland or Boutwell ever confessed or testified either one of them physically hit Krause with their "hands and fists". And, Marvin Krause was never asked by detectives or prosecutors to explain this inculpatory statement;

(b) Marvin Krause did not give a complete and truthful statement to the Metro Dispatcher that he was the "sole and lone " victim of a crime, when he did not tell the dispatcher that his was "was also hurt and had been stabbed" with a knife while she lay face down in a "pool of blood only two or four feet from him as he talked to the dispatcher". And, Mr. Krause was never asked by LVMPD detectives **why** he failed to tell the dispatcher his wife had been severly injured;

(c) When Marvin Krause hung up the phone he immediately went downstairs (leaving his wife to bleed to death) and waited for the police to arrive. He was never asked to explain his bizarre and surprising manner in which he left his wife all alone while he waited outside for the police instead of waiting for them to arrive in his wife's bedroom to aid her;

(d) The first thing Marvin Krause told Officer Robert Keiser when he arrived at the crime scene was "my ring and watch" were missing, **not** that his wife was hurt and had a knife sticking out of her back. Krause was never asked by Officer Keiser or Peter Dustin or detectives to explain **why** he was more concerned about his "ring and watch" than the severity of his wife's injuries;

(e) Marvin Krause told Officer Keiser his wife was **hurt,** upstairs and **knocked out**(ROA 3268; 3278) and did not mention to him **she had been stabbed** (ROA 3284)· He was never asked by detectives or prosecutors **why** he failed to tell Officer Keiser or Dustin his wife was stabbed since he according to Keiser told him he "**aided**" his wife by trying to stop her bleeding (ROA 3269); Surely, if Marvin Krause **aided** his wife as he claimed **he couldn't possibly "miss" seeing the knife in her back;**

(f) Marvin Krause did not even telephone for an ambulance to rush his wife

SUPPORTING FACTS: APP. 176

to a hospital , Officer Keiser requested Officer Peter Dustin call an ambulance (ROA 3264);

(g) Krause told Officer Keiser he was "conscious" during this incident, as so stated in Keiser's 1/17/74 police report and Chuck Lee's 1/15/74 police report, yet, Marvin Krause testified he was rendered "unconscious" during this incident ROA 3760;

(h) Mr. Krause's testimony he did not recognize the "voices" of either of the intruders, did not notice "any unusual features" of the suspects he could see and said **no** when questioned if there was anything particularly **unusual** about their voices and could not identify either of them if he saw them again ROA 3744; Krause and Weakland knew each other before this incident. Mr. Krause never told homicide detecives, prosecutors or the Court either prior to, during or after his testimony at Weakland's March 28-29, preliminary hearing that **he personally knew Weakland.** Weakland has both a "distinctive big head" and voice" that is easily detectible to anyone who has known or spoken to Weakland over any length of time;

(I) Thomas Boutwell, stated that he had the impression and feeling at the Krause residence that Marvin Krause "was waiting to be robbed" or **knew** what was going on;

(j) Marvin Krause made admissions to Geneva Blue of his hatred for his wife (Blue testimony before Judge Thompson on January 20, 1977;

(k) Both Marvin Krause and Weakland **hated** Petitioner;

(l) Weakland's March 29, 1974 statement (ROA 2390) provides further inferences Weakland knew Marvin Krause when Weakland stated: "I knew the Country Club anyway cause I had access to it... I had been able to get on the golf course because I had cleaned the swinning pool so I had a permit to go on the golf course;

(m) At the evidentiary hearing , State's Exhibit 7 was admitted showing

SUPPORTING FACTS:

Hilda Krause face down in a pool of blood on the carpet in her bedroom with a knife stuck in the middle of her back. yet, Marvin Krause testified he did not see anything around his wife's body "despite the presence of the knife, blood, and cord". (LaPENA'S POST HEARING REPLY BRIEF, at P. 12-13-14-15-16-17-18 & 23, 7/11/96)

17) Petitioner testified that WEAKLAND'S confession was overwhelmingly inconsistent to how he claimed he committed the murder when compared to Dr. Clarke's autopsy findings and after cross-referencing Weakland's confession; Krause's statements to Officer Keiser with Krause's March, 1974 testimony and Chuck Lee January 15, 1974, police report, he stated to himself that if WEAKLAND didn't do those criminal acts upon Hilda Krause , he described, **"who did?"**, and that indicated to him there was a **"second assailant"**, at the crime scene. And who was and who hired this second assailant to kill Hilda Krause and if the second assailant wasn't hired by anybody, what motive, purpose or reason would this person have to gain by killing her? But indeed, **whoever is was, did it,** and convinced Petitioner there was a second assailant and this should have been pursued strenuously right from the beginning because the evidence was right there. EHT P. 616-617

18) The State **admitted** to the fact, "a **second assailant existed**", when they stated in their Post-Hearing Brief, at P. 18, they had possession of information regarding the second assailant. (9 AA 1547)

19) On December 7, 1998, in a split decision, Petitioner's conviction and sentence was reinstated by the Nevada Supreme Court . On January 15, 1999, Petitioner filed a **Petition for Rehearing (PFR)**, stating the Court had misapprehended and disregarded numerous facts upon which the District Court based its decision in ordering a new trial as well as to other numerous crucial facts.

(1) At **PFR** Petitioner reminded the Court that in its 1993 Order the Court

SUPPORTING FACTS:

stated that Petitioner had set forth claims, that if true, would entitle him to relief. And, Petitioner proved his allegations before a court that made specific and detailed factual findings. **PFR**, at P. 2, **1/15/99**

(2) Certain portions of the **factual** recitation **made** by the Court in its decision, illustrates the complete misapprehension of the **facts** shown by Petitioner that demonstrate not only that he received ineffective assistance of counsel, but that he is **actually and factually innocent** of the crime which he was convicted, where the Court **found** that the **evidence** at trial **showed:** "the police ... found the deceased Mrs. Krause gagged with a **scarf** tied loosley around her neck, ... An autopsy revealed Mrs. Krause had been **strangled ...** and that she had sustained **several stab wounds to her neck 'after'** her throat had been slit." **PFR**, at P. 2-3, **1/15/99.**

(3) Petitioner presented to the Court that the testimony from Jerry Weakland both at the second trial and at the evidentiary hearing was that he **did not strangle** Mrs. Krause and **did not stab** her in the neck area **after** her throat had been slit (1 AA 144-46). The **fact** that Weakland, in essence **denied** inflicting the vast majority of the injuries to Mrs. Krause made it very clear "that a **second assailant**" must have been involved and quite likely was the individual that killed Mrs. Krause **PFR**, at P. 3, **1/15/99.**

(4) Petitioner presented evidence to the Court the facts were clear that Mr. Krause was "alone" in the house with Mrs. Krause, after Weakland and his accomplice Boutwell, left the residence. **PFR**, at P. 3, **1/15/99**

(5) Petitioner pointed out to the Court it misapprehended the extent of the cross-examination of WEAKLAND by trial counsel of WEAKLAND'S inconsistencies as simply cross-examining WEAKLAND about the inconsistency did not present the available defense that WEAKLAND did not kill Mrs. Krause and therefore petitioner was not responsible for her death and could not be guilty of murder **PFR**, at P. 4, **1/15/99.**

SUPPORTING FACTS:

20) Petitioner specifically directed the Court to the fact the State, in it's post hearing brief, **acknowledged** the existence and viability of the "**second assailant**" theory in proclaiming that "(a)11 information in **possession** to the State regarding this "second assailant" was disclosed.'" **PFR**, at P. 4, **1/15/99.**

21) Petitioner presented to the Court the difference of the specific questions and answers WEAKLAND gave at the trial level and 1995 evidentiary hearing, as to what WEAKLAND should have been confronted with and forced to admit before the jury. **PFR**, at P. 4-5-6-7, **1/15/99.** And, argued the record establishes that the Court misapprehended the extent of the cross-examination of WEAKLAND and the nature of the available evidence to impeach WEAKLAND.

22) The appellate court also failed to address the merits of the Motion to Dismiss filed by Petitioner and the subject of the cross-appeal, other than to state that "(h)aving concluded that LaPENA was properly convicted at his 1989 trial, we affirm the district court's denial of LaPENA'S motion to dismiss charges against him." 114 Nev. Ad. Op. 124, at 22. The Court failed to discuss **any of the concrete facts** that casts serious doubt on the guilt of Petitioner that was never presented at his trial. **PFR**, at P. 7-8, **1/15/99**

23) Petitioner also testified prior to trial he was offered a deal that would have allowed him to be released with credit for **time served,** however, he rejected the offer as it was a moral decision and he could not bring himself to do it (8 AA 1299) **RAB-AOB**, at P. 29-30, 10/1/97 .

APP. 180

Exhaustion of state court remedies regarding Ground 9:

▸ **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

___ Yes _X_ No. If no, explain why not: Ineffective Counsel

_____.

▸ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

_X_ Yes ___ No. If no, explain why not: Post-Conviction Relief

_____.

If yes, name of court: Eighth Judicial District Court date petition filed 6/3/92 12/6/93.

Did you receive an evidentiary hearing? _X_ Yes ___ No. Did you appeal to the Nevada Supreme Court? _X_ Yes ___ No. If no, explain why not: Cross-Appeal

_____.

If yes, did you raise this issue? _X_ Yes ___ No. If no, explain why not: _____

_____.

▸ **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If yes, explain why: _____

_____.

If yes, name of court: _____ date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not: _____

_____.

If yes, did you raise this issue? ___ Yes ___ No. If no, explain why not: _____

_____.

▸ **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: N/A

_____.

APP. 181

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 10

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fourteenth Amendment right to the United States Constitution, based on these facts: (State withheld Brady material from the defense and violated the Mandate of the Nevada Supreme Court)

1) On March 11, 1986, the district court ordered the State to disclose all police documents relevant to C.I. Costanza and submit a certificate of compliance with the order (ROA P. 898-899).

2) The district attorney's office and police department submitted a joint certificate on March 21, 1986, attesting that **all** documentation except one sensitive report unrelated to the prosecution, **were disclosed** to the defense.

3) On April 11, 1988, Petitioner filed a "Motion for Evidentiary Hearing to Determine Plaintiff's Compliance or lack Thereof with Defendant's Discovery Request". The motion alleged that the State "failed to disclose all material on Costanza". Following oral arguments on April 21, 1988, the district court denied the said motion and Petitioner appealed.

4) On August 26, 1988, in LaPena v. Eighth Jud. Dist. Ct. Case No. 18963, the Court granted Petitioner Mandamus relief and concluded, the State failed to rebut Petitioner's prima facie showing that the State had not fully complied with his discovery requests and the district court's previous order to produce. The State was ordered to produce **any** and **all known** and **available** evidence concerning Costance to the defense as well as any other Brady material.

5) An evidentiary hearing was held before Judge Thomas Foley on October

SUPPORTING FACTS:

26-27, 1988. By Order dated November 22, 1988, Judge Foley denied the motion finding that the prosecution "**complied** with the court's order **requiring disclosure of 'all' material relating to Costanza.**'"

6) Until the October, 1995, evidentiary hearing, there were items concerning crucial witness Costanza **that were withheld from the defense at the 1988 hearing and May, 1989, trial.** Petitioner presented to the Court on appeal those items withheld by the State per their 1988 Mandate Order as follows:

(A) The contents of interview conducted by Chuck Lee in New Jersey that lasted for "**several hours**" according to the memorandum prepared by Lee. The contents of that interview have been lost forever due to Lee's failure to **document the contents** of the interview and his claimed inability to now recall the contents of the interview (6 AA 1066). The report of Lee was marked into evidence as Exhibit 11 at the evidentiary hearing. Under questioning by Judge Porter Lee admitted Costanza feared for his safety if returned to Nevada (Lee did not mention this in his report); Lee also stated Costanza thought that either himself or his family members were in jeopardy and the possibility existed that he was concerned that he was going to be implicated in the murder, **RAB-AOB**, at P. 20-21; 70-71-72-73, **10/1/97;**

(B) The contents of the interview in Florida between Lee and Costanza . **No report was ever produced** with respect to this conversation and Gowen and Wysocki were aware of the conversation. When questioned again at the EH Lee again could only recall that after court he had a conversation with Costanza, **RAB-AOB**, at P. 73-74, **10/1/97.**

(C) Contents of interview, taped and handwritten statement from WEAKLAND concerning Costanza. Exhibit B, as introduced at the 1995 hearing showed that on September 16, 1983, Lee had gone to interview WEAKLAND at the Nevada State Prison concerning WEAKLAND and obtained a handwritten statement and taped statement from WEAKLAND (6 AA 1052). **No counsel for Petitioner, nor**

SUPPORTING FACTS:

Petitioner himself, had ever been provided with or seen or heard a copy of these documents. On appeal, Petitoner argued that WEAKLAND'S statements fell under the penumbra of the district court and Supreme Court's orders and the State failed to comply with those orders, **RAB-AOB**, at P. 74, **10/1/97**;

(D) Failure to reveal additional favors done for WEAKLAND.

1) Chuck Lee who maintained a relatively close relationship with WEAKLAND while WEAKLAND was in prison had seen WEAKLAND in prison on several occasions where WEAKLAND had provided Lee with information on other cases;

2) Lee was aware when WEAKLAND got into trouble in prison and Lee "might have" contacted someone in the prison system for WEAKLAND;

3) Lee also recalled that a **letter** was sent in support of WEAKLAND although he couldn't recall the specifics. "Nothing about these additional contacts or assistance was revealed to the defense prior to trial, **RAB-AOB**, at P. 74-75, **10/1/97.**

7) Petitioner presented to the appellate court on appeal, that the evidence and testimony at the 1995 evidentiary hearing established that the State withheld information about Costanza and the State's ongoing relationship **and contact** with Costanza. Additionally, the State also failed to reveal the **extent** of the assistance given to WEAKLAND over the years and to the defense **prior** to trial **RAB-AOB**, at P. 75, **10/1/97.**

8) Gary Gowen testified at the 1995 EH, that he had **personally** gone through the discovery files of the District Attorney and had **never** seen the interoffice memorandum that described the interview of Lee with Costanza in New Jersey , **RAB-AOB**, at P. 26, **10/1/97** 7 AA 1177-1179.

9) Petitioner testified at the 1995 EH, that the **1988** order required a hearing on compliance with providing information on Costanza (8 AA 1318) and despite all of his knowledge about the case over the years, he had **never** known about the visit and interview with Costanza in NJ until it was brought out

SUPPORTING FACTS: APP. 184

during the evidentiary hearing (8 AA 1319-1320). The same is true with the information about the interview and tape of an interview with WEAK-LAND by Lee at the Nevada State Prison concerning Costanza (8 AA 1322; 1325) **RAB-AOB**, at P. 30, **10/1/97**. And, that the two memo's or reports by Lee never surfaced or were disclosed at the time of the **1988** evidentiary hearing, E.H.T., at P. 641.

10) On appeal, Petitioner argued these violations denied him of a fundamentally fair trial and due process of law and is entitled to have the charges dismissed against him (**RAB-AOB**, at P. 75, **10/1/97**).

11) At the **1995**, evidentiary hearing Gary Gowen gave testimony that relates back to **GROUND ONE, Sections 4; 5; 6; 7; 8; & 11** when Gowen testified that on January 15, 1985, while in Carson City, he learned that Costanza had been picked up in Florida (7 AA 1172). Wysocki had informed him that **METRO was really bent out of shape because they had been jerked off the case by the District Attorney's Office**, which prompted him to dispatch Wysocki to Florida to interview Costanza (7 AA 1174). He (Gowen) later learned that Costanza **had been discharged for the State's failure to have the original documents on file** and within a week or so after the Florida incident, he had the occasion to run into Lee outside the courthouse and **Lee explained he did not know that he was supposed to have documents with him when he went to Florida** (**RAB-AOB**, at P. 25, **10/1/97** , 7 AA 1175-1176)

12) Investigator, Michael Wysocki, also gave testimony at the **1995**, hearing that relates back to **GROUND ONE with said Sections** when he testified on January 15, 1985, Detective Hatch advised him that Costanza had been picked up in Florida and was in a jail facility (6 AA 1103). Hatch further advised him **that homiicde had been removed from the extradition** and that Lee and John Finger were in the process of going back to see Costanza (6 AA 1105). After speaking with Gowen the following night he left for Florida to make contact

with Costanza (6 AA 1106). During a plane change in Houston, he ran into Lee and Finger and **was informed Costanza was released because "the necessary paperwork was not" presented to the court** (6 AA 1106). He then continued on to Florida **and spoke to "Court personnel" and was advised that Costanza had been relesed because there was no supporting documentation or certified copies of the application and certification of the material witness warrant RAB-AOB**, at P. 21-22, **10/1/97** 6 AA 1108.

13) In Petitioner's **PFR** he stated the Court misapprehended that attorney Gary Gowen tried to compel Costanza's **attendance** through the use of the Interstate Compact. This is not correct. Although Gowen tried the civil remedy to have Costanza appear before a local judge to submit under the Interstate Compact to take his deposition and NewJersey did not have such a reciprocal law, Gowen ventured to use a material witness warrant

14) The Court misapprehended in its conclusion that Gowen did not utilize the Uniform Act by accepting the State's unstantiated speculation that "Gowen deliberately ignored available means of gaining Costanza's attendance as a 'strategic delay tactic!'" because, if the State accepted the unfounded speculation of the State, it must also then find that attorneys Mills and Carter **deliberately ignored** available means to gain delays in the case, "**a finding that the Court did not make in it's Opinion**", **PFR**, at P. 8-9-10, **1/15/99**;

15) Petitioner also pointed out to the Court that their statement was contrary to the record in the case that, Gowen did not specify the nature of the information Costanza gave him in 1983, stating that "because LaPENA has failed to present any evidence that the substance of Costanza's 1983 conversation with Gowen would provide any additional information not previously presented to the jury he has failed to show prejudice by any of counsel's alleged deficiencies." **PFR**, at P. 10, **1/15/99** ;

GROUND TEN (CONTINUED)

SUPPORTING FACTS:

APP. 186

16) In Petitioner's **PFR** he reminded the Court that Judge Porter who **listened to five days of live testimony concerning inter alia, the** importance of the Costanza information and was able to asses the credibility of the witnesses took an active role in seeking the proper factual findings and engaged in the following conversation with Gowen during his testimony **that Costanza told Gowen more than what he told detective Whitney** in that Costanza told Gowen that when he met Weakland two weeks **prior** to Christmas, Weakland **had a "full diagram of the Krause household"**, the **schedule** of the individual and knew that the individual worked at Caesars Palace **PFR**, at P. 10, **1/15/99**;

Upon further questioning by Judge Porter who stated he and Gowen we're a **lot more detailed** in their Costanza conversation, Judge Porter asked Gowen **what else did Costanza tell you**, Gowen responded, Costanza told him **Weakland said he received this information from an employee at Caesars Palace**, and that **he knew this person** that they targeted for a burglary carried a lot of cash, bearer bonds and had a lot of valuables that were worth while in taking (7 AA 1203) **PFR**, at P. 11, **1/15/99.**

17) Petitioner argued that this information described by Gowen was **not presented to the jury in any form during his trial** and the record shows that Gowen did not pass this information on to Petitioner until well after he was convicted and, that contrary to the Court's opinion Petitioner **did** present direct testimony as to the contents of the conversation between Gowen and Costanza that was materially beyond what was presented to the jury, **PFR**, at P. 11, **1/15/99.**

18) On October 8, 1999, the Court, without opinion, denied Petitioner's Petition for Rehearing and, on October 26, 1999, the Nevada Supreme Court issued a Remittitur.

APP. 187

Exhaustion of state court remedies regarding Ground 10:

▸ **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

___ Yes _X_ No. If no, explain why not: State never disclosed this evidence, despite District and Appellate Court Orders to do so.

▸ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

X Yes ___ No. If no, explain why not: PETITION FOR POST-CONVICTION RELIEF.

If yes, name of court: Eighth Judicial District Court date petition filed 6 / 3 /92.

Did you receive an evidentiary hearing? _X_ Yes ___ No. Did you appeal to the Nevada Supreme Court? _X_ Yes ___ No. If no, explain why not: _____.

If yes, did you raise this issue? _X_ Yes ___ No. If no, explain why not: _____.

▸ **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If yes, explain why: _____.

If yes, name of court: _____ date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not: _____.

If yes, did you raise this issue? ___ Yes ___ No. If no, explain why not: _____.

▸ **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: _____.

APP. 188

WHEREFORE, petitioner prays that the court will grant him such relief to which he is entitled in this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody.

FRANK LaPENA
(Name of person who wrote this complaint if not Plaintiff)

Frank LaPena
(Signature of Plaintiff)

7/12/2000
(Date)

(Signature of attorney, if any)

(Attorney's address & telephone number)

DECLARATION UNDER PENALTY OF PERJURY

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.** See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at S.N.C.C., Jean, Nevada (Location) on July (Date).

P. O. Box 100
Jean, NV 89026

Frank LaPena
(Signature)

28907
(Inmate prison number)

§2254-Form
eff. 1/97

APP. 189

FRANK R. LaPENA
NDOP #28907
P. O. BOX 100-SNCC
JEAN, NV 89026

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FRANK RALPH LaPENA,

Petitioner,

-vs-

RICK WALKER, Warden,

Respondent.

PETITIONER'S EXHIBITS

ATTACHED OPINIONS

1. LaPENA v. State, 92 Nev. 1, 544 P.2d 1187 (1976) (3-2 split decision on probable cause);

2. LaPENA v. State, 98 Nev. 135, 643 P.2d 244 (1982)(Reversed and Remanded, prosecution would not let Weakland reap the benefits of his plea bargain until after he had incriminated LaPena at the preliminary hearing. The plea bargain was thereby used to induce cooperation and Weakland claimed to have been coerced into making the incriminating statements)

3. Weakland v. State, 96 Nev. 699, 615 P.2d 252 (1980)(evidence of Weakland's perjury not overwhelming, when charged by State, Weakland committed perjury when he testified LaPena had nothing to do with this crime stating his prior statements and testimony at LaPena's 1974, preliminary hearing were untrue);

4. State v. LaPena, 114 Nev. 1159, 968 P.2d 750 (1998) (split-decision overturning District Court Judge granting LaPena habeas corpus relief and new trial on ineffective assistance of counsel)

APP. 190

5. LaPena v. Eighth Judicial District Court, Case #14640 (August 31, 1983) Order Granting Writ of Mandate)

6. LaPena v. Eighth Judicial District Court, Case #16196 (October 22, 1985) Order Granting Writ of Mandate)

7. LaPena v. Eighth Judicial District Court, Case #18963 (August 26, 1988) Order Granting Writ of Mandate)

8. Metro Intelligence Officer, Michael Whitney's January 18, 1974, Police Report RE: Confidential Informant's Knowledge of Hilda Krause homicide.

9. Metro Homicide Detective Chuck Lee's February 8, 1974, Police Report Re; C.I.

10. Order of Remand, Nevada Supreme Court, November 24, 1993

11. Nevada Supreme Court Justice E.M. Gunderson's statement that Weakland's first statement to police and prosecutors was Marvin Krause had hired him to kill his wife

12. Judge Gene Porter's Findings of Fact, Conclusions of Law

13. Remittitur, Nevada Supreme Court, October 26, 1999

REPORTS OF CASES

DETERMINED BY THE

SUPREME COURT

OF THE

STATE OF NEVADA

Volume 92

FRANK RALPH LAPENA AND ROSALIE MAXWELL, APPELLANTS, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 8063

January 2, 1976 544 P.2d 1187

Appeal from orders denying petition for writs of habeas corpus. Eighth Judicial District Court, Clark County; Carl J. Christensen, Judge.

Accused filed petitions for writs of habeas corpus, on grounds that testimony of alleged accomplice was insufficient to bind them over for trial. The district court denied petitions, and accused appealed. The Supreme Court, ZENOFF, J., held that independent evidence presented at preliminary hearing was sufficient to support alleged accomplice's testimony that he had been hired by accused to murder victim; that hearsay testimony by second accomplice to robbery-murder, regarding statements made by murderer, was admissible; and that fact that admitted murderer's charge was reduced to second-degree

murder in exchange for his testimony did not affect admissibility of his testimony.

Affirmed.

GUNDERSON, C. J., and BATJER, J., dissented.

Goodman and Snyder, and *Douglas G. Crosby,* of Las Vegas, for Appellants.

Robert List, Attorney General; *George E. Holt,* District Attorney, and *Dan M. Seaton,* Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   Although independent corroboration is necessary to support testimony of accomplice, such corroboration need not be found in single fact or circumstance, but, rather, several circumstances in combination may be sufficient if circumstances and evidence from sources other than testimony of accomplice tend on whole to connect accused with crime charged. NRS 175.291, subd. 1.
2. CRIMINAL LAW.
   Where, in addition to testimony by purported accomplice that accused offered to pay him to murder victim, there was evidence that victim's husband had illicit relationship with one accused and that such accused occasionally received money from husband, trial court was justified in finding that murderer's testimony was "corroborated by other evidence" within meaning of statute requiring independent evidence to support testimony of an accomplice. NRS 175.291, subd. 1.
3. CRIMINAL LAW.
   Hearsay statements made by murderer to accomplice in murder-robbery did not constitute "testimony" of accomplice within meaning of statute requiring the corroboration of accomplice's testimony by independent evidence, and were admissible at preliminary hearing of accused charged with hiring murderer to kill victim. NRS 175.291, subd. 1.
4. CRIMINAL LAW.
   Fact that confessed murderer's charge was reduced to second-degree murder in exchange for testimony inculpating accused as perpetrator of murder merely affected weight of such testimony, not its admissibility.

OPINION

By the Court, ZENOFF, J.:

Frank LaPena and Rosalie Maxwell were charged as principals in the robbery of Marvin and Hilda Krause and in the murder of Hilda Krause on January 14, 1974. That the robbery and murder occurred is not in issue. Maxwell and LaPena

appeal from orders denying their petition for habeas corpus. They contend that for lack of sufficient corroborating evidence to the testimony of accomplice Gerald Weakland, who admitted the commission of the crime, they should not be bound over for trial.

LaPena and Rosalie Maxwell apparently believed that Marvin Krause was a man who possessed substantial wealth. Evidently, Rosalie and Krause had been meeting surreptitiously for a period of time prior to the robbery and killing. Weakland testified at the preliminary hearing that he was hired by LaPena to kill Hilda Krause so that Rosalie would be in a position to enjoy Krause without interference from his wife. LaPena would profit because he was Rosalie's true lover and he would stand, he hoped, as a pecuniary beneficiary to the Krause-Maxwell relationship.

NRS 175.291(1) provides:

"A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof."

[Headnote 1]

Since Weakland is an accomplice we must determine what evidence is present independent of the accomplice testimony to connect LaPena and Maxwell with the crime. The necessary corroboration need not be found in a single fact or circumstance, rather several circumstances in combination may satisfy the statute. If circumstances and evidence from sources other than the testimony of the accomplice tend on the whole to connect the accused with the crime charged, it is enough. LaPena v. Sheriff, 91 Nev. 692, 541 P.2d 907 (1975); Lamb v. Bennett, 87 Nev. 89, 482 P.2d 298 (1971).

The composite of facts and circumstances as established by the testimony of many witnesses take the two accused beyond the status of mere casual association with Weakland. See Eckert v. State, 91 Nev. 183, 533 P.2d 468 (1975); Austin v. State, 87 Nev. 578, 491 P.2d 724 (1971); Ex Parte Hutchinson, 76 Nev. 478, 357 P.2d 589 (1960). From the testimony of other witnesses it is established that LaPena was not merely an acquaintance of Weakland, as we noted in LaPena v. Sheriff, supra, but one who with Maxwell had a motive to get rid of Hilda Krause and who was therefore linked inculpably to Weakland in a criminal scheme.

Among the witnesses were persons related to Weakland, brothers, sister-in-law and former wife, all of whom had been brought into contact with Frank LaPena by Weakland, as well as others. Their testimony concerned events and conversations that transpired proximately before and after the crimes were committed.

For a short period preceding the offenses, Jerry Weakland lived in the residence of his sister-in-law, Sandra. She testified to receiving phone calls from a "Frank" at her home. The telephone number she noted was traced at the preliminary hearing to Frank LaPena. She eventually was introduced to LaPena by Weakland and she knew of no other acquaintance of Jerry's who bore the same first name of "Frank."

Additionally, in the daylight hours after the crimes were committed Weakland brought a portable TV set to her home. A portable TV set was part of the loot from the robbery. She added that the TV set was quickly taken from her dwelling by Jerry's brothers and destroyed, which as they testified was because of the surveillance of Jerry by the police after January 14.

Certain jewelry was taken from the Krauses by the culprits, principally a watch and a ring. Jerry gave a friend and a brother a watch and a ring that answered the description of the Krause jewelry. Gail had been taken to Rosalie Maxwell's residence prior to the commission of the crimes by her former husband and after the crimes she was sent twice by Weakland to pick up cash from LaPena. Weakland also showed his ex-wife, Gail, $1,000 in cash in $100 bills that came suddenly into his possession at or about the time of the robbery and murder. She also saw him hide a watch and a ring a few hours after the time the crimes were committed.

Weakland testified that he borrowed his former wife's 1973 Monte Carlo automobile at 3:00 a.m., January 14. Together with Thomas Boutwell they drove to a point near the Krause residence and parked it. After gaining entrance to the house he detailed how Boutwell tied up Marvin Krause and took him to a room away from where they met Hilda Krause. Jerry then hit Marvin Krause over the head with a .38 caliber pistol rendering him unconscious. Boutwell proceeded to strip Krause of his jewelry and what little cash he found on Krause's body. At the same time Weakland took Mrs. Krause to another room, bound her arms behind her, fashioned her with a gag and hit her on the head with his fist which was covered with a black leather glove. He had obtained, prior to this event, a pair of black leather lead-filled gloves from LaPena. While she was thus unconscious,

he turned her face down, pulled her head up by the hair and cut her throat.

Boutwell was in another part of the house at the time apparently unaware of the murder. Together they carried the TV set outside to Krause's Cadillac automobile and drove to the Monte Carlo car. When they were moving the TV set into the rear portion of Gail Weakland's automobile a corner of the TV set ripped the liner of the car top. Gail testified she recalled that her car was in good shape when Jerry borrowed it but that when it was returned she noted the tear in the roof. This occurred during the morning hours following the murder.

Gail corroborated Weakland's testimony that together they went to Lake Havasu after the crimes (although she did not know that crimes had been committed) and that she was present when Weakland attempted to call LaPena long distance from their motel room, to which the motel manager also testified.

Gail testified further and variously about Weakland sending her to LaPena for money on two occasions, that she returned the black gloves to LaPena at the Hacienda Hotel under furtive circumstances and even that prior to January 14 he showed her a hand-drawn map of the Krause residence which he later destroyed in her presence.

[Headnote 2]

Rosalie Maxwell admitted to a detective that she was a sexual companion to Marvin Krause while his wife was out of the city; that Krause gave her money from time to time; and that Krause was her "live one" but Frank LaPena was her true lover. The totality of the testimony and evidence are supportive of inferences that Rosalie Maxwell and LaPena sought to eliminate Hilda Krause so that Rosalie and LaPena would be in a position to enjoy Krause's wealth without Hilda's interference. For this, Weakland was to be paid $10,000 by the end of the year.

One of Weakland's brothers told of instructions from Jerry that if Jerry were ever in circumstances where he needed money, the brother was to see "Frank" and he would get some.

Additional permissible inferences can be drawn from the testimony of Bobby Webb, Mary Bordeaux and police officer Avants. LaPena v. Sheriff, supra; Goldsmith v. Sheriff, 85 Nev. 295, 454 P.2d 86 (1969). Weakland, the accomplice and coconspirator, told Webb of the contemplated robbery and indicated that a friend of his had supplied him with a map to the apartment, that he had given him information on what time

The district court conducted hearings on LaPena's post-conviction proceedings and hearings. The district court took evidence and made certain findings of fact that I do not think should be violated by this court. I see no reason to intrude into the district court's discretion or to set aside the district court's dismissing the charges against LaPena. I dissent from this court's overruling of the district court's proper ruling in this case.

Edward Robert HENNIE, Appellant,

v.

The STATE of Nevada, Respondent.

No. 28642.

Supreme Court of Nevada.

Dec. 14, 1998.

The District Court, Lyon County, Mario G. Recanzone, J., denied defendant's motion for a new trial following his conviction of burglary, grand larceny, felony theft from a vending machine, and attempted theft. Defendant appealed. The Court of Appeals held that newly discovered evidence justified a new trial.

Reversed and remanded.

1. Criminal Law ⇐938(1)

Grant or denial of a new trial on the ground of newly discovered evidence is within the discretion of the trial court. N.R.S. 176.515.

2. Criminal Law ⇐938(1)

General standard for a new trial based on newly discovered evidence is that: (1) the evidence must be newly discovered; (2) it must be material to the defense; (3) it could not have been discovered and produced for trial even with the exercise of reasonable diligence; (4) it must not be cumulative; (5) it must indicate that a different result is probable on retrial; (6) it must not simply be an attempt to contradict or discredit a former witness; and (7) it must be the best evidence the case admits. N.R.S. 176.515.

3. Criminal Law ⇐942(1)

Newly discovered impeachment evidence may be sufficient to justify granting a new trial if the witness impeached is so important that impeachment would necessitate a different verdict. N.R.S. 176.515.

4. Criminal Law ⇐942(1)

Evidence that witnesses who testified against defendant accused of burglary, grand larceny, and theft, conspired with each other to murder witness' ex-wife and that one witness was substantially in debt to the other, was not cumulative but justified a new trial; defendant claimed he was framed by witnesses, defendant was largely convicted based on the testimony of the witnesses, jury was under the mistaken impression that witnesses were neutral, and knowledge of the conspiracy was critical to defendant's defense. N.R.S. 176.515.

Patrick Gilbert, Minden, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Robert E. Estes, District Attorney, and John Paul Schlegelmilch, Deputy District Attorney, Lyon County, for Respondent.

OPINION

PER CURIAM:

Between October and December 1994, a series of property crimes was committed in the Fernley, Nevada area. Based largely on circumstantial evidence and the testimony of the State's two key witnesses, Stanley Brown and Maurice Marineau, appellant Edward Robert Hennie was ultimately charged with committing the crimes.

During trial, Hennie asserted his innocence and claimed that he had been framed for the various crimes by his roommates, Brown and Marineau. At the conclusion of trial, the jury found Hennie guilty of burgla-

the only independent witness who could hear and see the transaction in question. He was a material witness whose identity should have been disclosed. The magistrate's refusal to require disclosure or dismiss the charges was error. Thus, the district court correctly granted Vasile's habeas petition. NRS 171.196(4). *See Routhier v. Sheriff, supra.*

In light of our ruling, it is not necessary to decide other grounds for dismissal raised in the habeas petition.

Affirmed.

Frank LaPENA, Appellant,

v.

The STATE of Nevada, Respondent.

No. 10938.

Supreme Court of Nevada.

Jan. 10, 1980.

Defendant was convicted before the Eighth Judicial District Court, Clark County, Carl J. Christensen, J., of second-degree kidnapping and battery with the use of a deadly weapon, and he appealed. The Supreme Court, Mowbray, C. J., held that: (1) trial court did not err in admitting witnesses' extrajudicial statements under coconspirator exception to hearsay rule, and (2) evidence independent of testimony or extrajudicial statements of accomplices was insufficient.

Reversed and remanded.

1. Criminal Law ⇐427(5)

Under coconspirator exception to hearsay rule, independent evidence necessary to show existence of conspiracy need only be slight, although it must be independent of extrajudicial statements sought to be admitted. N.R.S. 51.035, subd. 3(e).

2. Criminal Law ⇐427(5)

In prosecution for second-degree kidnapping and battery with the use of a deadly weapon, trial court did not err in admitting witnesses' statements to third parties under coconspirator exception to hearsay rule, where evidence of conspiracy was supplied by direct testimony at trial of one of the conspirators; such testimony was evidence independent of conspirators' extrajudicial statements so as to permit their introduction under coconspirator exception. N.R.S. 51.035, subd. 3(e).

3. Criminal Law ⇐511.2

Statute which provides that accused may not be convicted on testimony of accomplice unless accomplice is corroborated by other evidence which in itself tends to connect defendant with commission of offense demands more than evidence which casts grave suspicion on defendant. N.R.S. 175.291, 175.291, subd. 1.

4. Criminal Law ⇐511.2

In prosecution for second-degree kidnapping and battery with use of a deadly weapon, no evidence was present independent of testimony or extrajudicial statements of accomplices which tended to connect defendant with commission of offense, and thus evidence was insufficient to comply with statute providing that the defendant may not be convicted on testimony of accomplice unless accomplice is corroborated by other evidence which in itself tends to connect defendant with commission of offense. N.R.S. 175.291, 175.291, subd. 1.

5. Criminal Law ⇐543(1)

Admissibility of preliminary hearing testimony in later proceedings is governed by statute providing that such testimony may be used as substantive evidence in criminal trial only when witness is sick, out of the state, dead, or when his personal attendance cannot be had in court; such statute, which deals specifically with issue of admissibility of preliminary hearing testimony of witness who persistently refuses to testify, prevailed over general evidence

code provision governing admissibility of former testimony of unavailable witness. N.R.S. 51.055, subd. 1(b), 51.325, 171.198, subd. 7.

Bell, Leavitt & Green, Chtd. and Stewart L. Bell, Las Vegas, for appellant.

Richard H. Bryan, Atty. Gen., Carson City, Robert J. Miller, Dist. Atty. and Ira H. Hecht, Deputy Dist. Atty., Las Vegas, for respondent.

OPINION

MOWBRAY, Chief Justice:

Frank LaPena appeals from his conviction, after a court trial, of second degree kidnaping and battery with the use of a deadly weapon. We consider several of appellant's assignments of error as meritorious, and we therefore reverse the judgment of conviction and remand for a new trial.

THE FACTS

Around midnight on November 23, 1973, Willis Obenauer was abducted by two men as he returned to his apartment in Las Vegas. He was forced into his car at gunpoint, driven out into the desert, beaten, and shot once in each leg. The two men, Webb, the driver, and Weakland, the actual assailant, left Obenauer in the desert. They later abandoned his car, and made their way back to Las Vegas. Weakland and Webb were ultimately arrested in March, 1974, and incriminated appellant in their statements to police. LaPena was arrested and charged with the assault on Obenauer. At LaPena's preliminary hearing Webb and Weakland testified that LaPena had instigated and paid for the attack. We held, on appeal from denial of LaPena's petition for a writ of habeas corpus, that probable cause sufficient to hold him to answer had been shown. *LaPena v. Sheriff*, 91 Nev. 692, 541 P.2d 907 (1975).

At trial, testimony directly inculpating LaPena was given by Webb; but when Weakland was called, he testified that he had no recollection of the assault on Obenauer, of giving statements to the police, or of testifying at LaPena's preliminary hearing. The trial court thereupon ruled Weakland an unavailable witness, under NRS 51.055(1)(b), and admitted into evidence the transcript of Weakland's testimony at the preliminary examination and a videotape of a statement Weakland had given the police after plea negotiations over his own participation in the murder of Hilda Krause. *See LaPena v. State*, 92 Nev. 1, 544 P.2d 1187 (1976). Appellant presented an alibi defense: several of his former neighbors testified that on the night of the assault on Obenauer, when Webb and Weakland testified that LaPena had pointed out the victim at the hotel where both men worked, LaPena had been at home. The trial court found appellant guilty; this appeal ensued.

THE SUFFICIENCY OF THE EVIDENCE

[1, 2] Appellant contends that insufficient evidence of his participation in the conspiracy to assault Obenauer was presented to permit the introduction of Webb's and Weakland's extrajudicial statements under the coconspirator exception to the hearsay rule. NRS 51.035(3)(e). We do not agree. The independent evidence necessary to show the existence of a conspiracy need only be slight, *Goldsmith v. Sheriff*, 85 Nev. 295, 454 P.2d 86 (1969), although it must be independent of the extrajudicial statements sought to be admitted, *Fish v. State*, 92 Nev. 272, 549 P.2d 338 (1976); *Goldsmith v. Sheriff*, 85 Nev. at 305, 454 P.2d at 92. In this case, evidence of the conspiracy was supplied by the direct testimony at trial of Webb, one of the conspirators; this is clearly evidence independent of the conspirators' extrajudicial statements. *United States v. Hedge*, 462 F.2d 220 (5th Cir. 1972); *Laughlin v. United States*, 128 U.S.App.D.C. 27, 385 F.2d 287 (D.C.Cir.), *cert. denied*, 390 U.S. 1003, 88 S.Ct. 1245, 20 L.Ed.2d 103 (1967). We therefore perceive no error in the admission of Webb's and Weakland's statements to third parties under the coconspirator exception.

[3, 4] Appellant also asserts that insufficient evidence to corroborate the testimony of the accomplices as to his involvement in the offense was adduced at trial to comply with the requirements of NRS 175.291.[1] With this contention, we must agree. The State asserts that the issue of corroboration is concluded by this Court's decision in *LaPena v. Sheriff*, 91 Nev. 692, 541 P.2d 907 (1975), in which we found that probable cause existed to hold LaPena for trial. The corroborated evidence at the preliminary hearing established that LaPena disliked Obenauer, that he was associated with Weakland, and that neither Weakland nor Webb had any personal motive for the assault. In the context of showing probable cause, that was sufficient.

At trial, however, explanatory evidence was adduced. It was shown that Obenauer was disliked by his subordinates at work generally, not only by LaPena. Bordeaux, Webb's girlfriend, testified that she had originally understood from Webb that the assault on Obenauer was being made at the request of Weakland's brother; and that she had heard the name Frank only in February, 1974, when Webb cautioned her to forget the name Frank. Hodges, Weakland's ex-wife, testified that she had seen Weakland and LaPena together; that she had received money from LaPena for delivery to Weakland in February, 1974; and that she had returned a pair of lead-weighted gloves to LaPena, at Weakland's request, near the end of January, 1974. This is part of the same evidence which we found sufficient to hold LaPena for trial for the murder of Hilda Krause, which occurred on January 14, 1974, and in which Weakland was again the actual perpetrator. *LaPena v. State*, 92 Nev. at 5, 11, 544 P.2d at 1189, 1193. As far as the *corroborated* testimony of Webb and Weakland casts any suspicion on appellant, it seems to be in regard to the Krause murder rather than the Obenauer assault. It is unclear even from the testimony of Webb whether the lead-weighted gloves were actually used in the attack on Obenauer, while they do seem to have been used in the Krause murder. *Id.* at 4, 544 P.2d at 1189. We have held that the corroboration requirement demands more than evidence which "casts [a] grave suspicion on the defendant," *Eckert v. State*, 91 Nev. 183, 186, 533 P.2d 468, 471 (1975) (citations omitted). In the circumstances of this case, we find that no evidence, independent of the testimony or extrajudicial statements of the accomplices, is present which "tends to connect" appellant with the commission of the instant offense.

WEAKLAND'S TESTIMONY

[5] The trial court ruled Weakland unavailable as a witness because he was "[p]ersistent in refusing to testify," NRS 51.055(1)(b), and admitted his preliminary hearing testimony under the former testimony exception to the hearsay rule, NRS 51.325. We note that the admissibility of preliminary hearing testimony in later proceedings is governed by NRS 171.198(7), which provides, in pertinent part, that such testimony may be used as substantive evidence in a criminal trial only "when the witness is sick, out of the state, dead, or when his personal attendance cannot be had in court." This statute, dealing specifically with the subject at issue, prevails over the general evidence code provision, *see W. R. Co. v. City of Reno*, 63 Nev. 330, 172 P.2d 158 (1946). On remand, therefore, the trial court should test the admissibility of Weakland's preliminary hearing testimony as a substitute for his live testimony under NRS 171.198(7).

It was drawn to our attention at oral argument that the accomplice Weakland has been tried and convicted of perjury (in the Eighth Judicial District Court, Case No. C37651) in connection with testimony he gave in the Krause murder trial, a matter

1. NRS 175.291(1) provides: "A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof."

closely related to the instant case. We prefer to have the district court deal in the first instance with any questions raised by the conviction of Weakland in light of *Mesarosh v. United States*, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956) and *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974).

The judgment of the district court is reversed and the cause is remanded for a new trial.

THOMPSON, GUNDERSON, MANOUKIAN and BATJER, JJ., concur.

Dwayne GIBSON, Appellant,

v.

The STATE of Nevada, Respondent.

No. 11506.

Supreme Court of Nevada.

Jan. 10, 1980.

Defendant was convicted of grand larceny and possession of stolen property, and from the judgment of the Sixth Judicial District Court, Humboldt County, Llewellyn A. Young, J., the defendant appealed. The Supreme Court held that: (1) defendant waived any defects in grand jury proceedings by failing to file a proper pretrial motion; (2) fact that a prosecution was initiated by indictment rather than by information does not violate an accused's right to due process and equal protection; (3) circumstantial evidence sustained the conviction; and (4) the trial court did not abuse its discretion by granting the State's motion to join the two indictments.

Affirmed.

1. Criminal Law ⇐1044.1(1)

Appellant could not object to alleged errors in grand jury proceedings where defendant did not seek to remedy such alleged defects by proper pretrial motion. N.R.S. 174.105, subds. 1, 2.

2. Constitutional Law ⇐250.2(1), 265

The fact that the prosecution was initiated by indictment rather than by information does not violate an accused's right to due process and equal protection. U.S.C.A.Const. Amend. 14.

3. Larceny ⇐65

Circumstantial evidence sustained conviction of grand larceny. N.R.S. 205.220.

4. Criminal Law ⇐747

Where there is conflicting testimony presented, it is for the jury to determine the weight and credibility to give to the testimony.

5. Criminal Law ⇐1159.2(5)

Since there is substantial evidence to support jury's verdict of guilt, it will not be disturbed on appeal.

6. Criminal Law ⇐620(1)

Trial court did not abuse its discretion in granting State's motion to join indictment charging grand larceny with indictment charging possession of stolen property where offenses charged were based on a common scheme or plan. N.R.S. 173.115, subd. 2, 205.220, 205.275; Fed.Rules Cr. Proc. Rule 8(a), 18 U.S.C.A.

Norman Herring, State Public Defender, Carson City, for appellant.

Richard H. Bryan, Atty. Gen., Carson City and William Macdonald, Dist. Atty., Humboldt County, Winnemucca, for respondent.

OPINION

PER CURIAM:

After a jury trial, appellant was found guilty of grand larceny (NRS 205.220) and possession of stolen property (NRS 205.275). Appellant was sentenced to two 5-year sen-

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK RALPH LA PENA,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT and THE HONORABLE JOHN F. MENDOZA, District Judge,

Respondents.

No. 14640

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original proceeding in mandamus challenges an order of the district court denying a motion for disclosure of the identity of a confidential informant. Petitioner contends that denial of his motion will result in the unconstitutional restriction of his right to prepare for trial and the right of cross-examination. We agree.

The present litigation results from an indictment brought following our reversal of petitioner's conviction. La Pena v. State, 98 Nev. 135, 643 P.2d 244 (1982). Petitioner's motion for disclosure was filed in anticipation of retrial of the case. The state sought to protect the identity of the informer pursuant to NRS 49.335,[1] and the trial court denied petitioner's motion without stating reasons. We must assume the trial court found that there is no reasonable probability that the confidential informant could give testimony necessary to a fair determination of the issue of guilt or innocence. NRS 49.365.[2] Our review of the record has convinced

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[1] NRS 49.335 provides:

The state or a political subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished to a law enforcement officer information purporting to reveal the commission of a crime.

[2] NRS 49.365 provides:

If the state or a political subdivision elects not to disclose the identity of an informer and the circumstances indicate a reasonable probability that the informer can give testimony necessary to a fair determination of the issue of guilt or innocence, the judge shall on motion of the accused dismiss the proceedings, and he may do so on his own motion.

us that the trial court erred as a matter of law and that mandamus is the appropriate remedy under the unusual circumstances presented by this case.

The test to be applied when confronted with this issue, as provided by the statute, is whether there is a reasonable probability that the informant can give testimony necessary to a fair determination of the issue of guilt or innocence. Sheriff v. Vasile, 96 Nev. 5, 604 P.2d 809 (1980). The court must balance the public interest in nondisclosure against the defendant's right to prepare his defense adequately. "Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Roviaro v. United States, 353 U.S. 53, 62 (1957); Brown v. State, 94 Nev. 393, 580 P.2d 947 (1978).

The crimes charged in this case are murder and robbery based upon a "contract to kill whereby Gerald Ronald Weakland was to kill Hilda Stout Krause." The robbery charge is based on an allegation of a contract whereby Weakland was to commit the robbery. Weakland's statements and testimony form the primary factual basis for both the previous prosecution and the present indictment. It is clear from our previous opinion in this case that a possible defense in the current proceeding will be based on an attack on Weakland's credibility. Additionally, petitioner asserts that Weakland has made inconsistent statements with regard to the source of the contract to kill. Petitioner also claims that Weakland's assertions to the confidential informant, and the timing of Weakland's contact with the confidential informant, may support an exculpatory theory. The transcript of the grand jury proceeding which resulted in this indictment contains statements by Weakland manifesting confusion as to the parties involved in the commission

of the murder, and the informant has advised police of statements by Weakland which are inconsistent with Weakland's testimony before the grand jury and inconsistent with his testimony in the prior proceedings. Additionally, we note that at the prior trial Weakland recanted his initial inculpatory statements.

The significance of the informer's testimony becomes manifest when the potential importance of cross-examination of Weakland is assessed based on the factors listed above. The need for an adversarial confrontation of Weakland is heightened by the substantial reliance which the prosecution has placed on Weakland for the development of its case.

The state contends that the informant was a mere "tipster" because he did not provide information leading to La Pena's arrest and because he was not present when the crime was committed. See Miller v. State, 86 Nev. 503, 471 P.2d 213 (1970). Additionally, the state asserts that the informer must be an eyewitness, or must provide information leading to the arrest of the defendant, in order to establish the necessity of disclosure. We reject these contentions. The value and importance of the potential testimony of this informant lie in his knowledge of the state's chief witness and not in his direct participation in the crime. Nevertheless, in this case Weakland's credibility is directly related to "a fair determination of the issue of guilt or innocence" under NRS 49.365. Denial of the right of effective cross-examination would be constitutional error of the first magnitude. Davis v. Alaska, 415 U.S. 308, 318 (1974). The public interest in protection of the identity of the informant must yield to the defendant's right to inform the jury of those facts from which the jury may determine the reliability of the witness. See Davis v. Alaska, supra (public interest in protection of juvenile record must yield to right of effective cross-examination).

Therefore, the trial court erred by denying petitioner's motion to disclose. Further, we find that because petitioner's

right to prepare for trial and to cross-examine the witnesses against him will be abridged by denial of disclosure in this case, the error was of constitutional magnitude. In addition, we note that this issue was raised in the appeal of the previous conviction and that it was not decided. Had the issue been decided at that time the necessity of a pretrial motion and the resulting petition for extraordinary relief would have been obviated. Under these unique circumstances, we find that relief in the form of mandamus is appropriate.

Accordingly, we ORDER the issuance of a writ of mandamus compelling the district court to vacate its order denying petitioner's motion to disclose the identity of the confidential informant. The district court shall enter an order which provides for disclosure of the information sought in the motion. Should the state exercise its privilege not to disclose the informer's identity the district court shall order the case dismissed pursuant to NRS 49.365.

Manoukian, C. J.

Springer, J.

Mowbray, J.

Steffen, J.

Gunderson, J.

cc: Hon. John F. Mendoza, District Judge
Hon. Brian McKay, Attorney General
Hon. Robert J. Miller, District Attorney
Gary E. Gowen
Loretta Bowman, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK R. LA PENA,

Petitioner,

vs.

JOHN MORAN, Sheriff, THE HONORABLE MICHAEL J. WENDELL and THE EIGHTH JUDICIAL DISTRICT COURT OF NEVADA,

Respondents.

No. 16196

FILED

OCT 22 1985

Judith Townsend

CLERK OF SUPREME COURT

ORDER

This original petition for a writ of habeas corpus or, alternatively, writ of mandamus, challenges several orders of the respondent district court in the criminal proceedings below against petitioner.

Initially, petitioner alleges that the state has failed to comply with our order of August, 1983, mandating the disclosure of the identity of a confidential informant. The state, however, has identified the informant as **Joseph Constanza**. Additionally, in light of the state's concessions at oral argument as explained below, we conclude that the state has complied with our prior order or will comply without further intervention by this court.

Petitioner next challenges an order of the district court which denied his motion to require two state witnesses, who have allegedly refused to speak with petitioner's counsel, to submit to interviews. Petitioner now seeks a writ compelling the district court to suppress the trial testimony of these two witnesses. Petitioner has failed to demonstrate, however, that the district court abused its discretion or acted arbitrarily or capriciously in refusing to compel these interviews. See State v. Jones, 617 P.2d 1214 (Hawaii 1980) (accused has no right to pretrial interview of witness who refused to be interviewed); see also State v. Trow, 642 P.2d 1178 (Or. App. 1982) (trial court did not abuse its discretion by denying motion to compel

prosecution witness to submit to interview); see generally Round Hill Gen. Imp. District v. Newman, 97 Nev. 601, 637 P.2d 534 (1981) (mandamus relief available where district court manifestly abused its discretion or exercised its discretion arbitrarily or capriciously). Accordingly, petitioner's request for a writ of mandamus directing the district court to suppress the testimony of the two state's witnesses, Avants and Lee, is hereby denied.

Next, petitioner challenges the district court's order denying his motion to disqualify the district attorney's office. The disqualification of a prosecutor's office rests within the sound discretion of the district court. Collier v. Legakes, 98 Nev. 307, 309, 646 P.2d 1219, 1220 (1982). Petitioner has failed to demonstrate that the district court acted arbitrarily or capriciously by denying the motion. Petitioner's pending civil rights suit against some members of the district attorney's office is insufficient to necessitate a disqualification of the office. See State v. Lucas, 597 P.2d 192 (Ariz. Ct. App. 1979). Furthermore, petitioner has failed to demonstrate adequately his allegation that the district attorney's office has such a personal interest in his conviction that the prosecutorial function cannot be carried out impartially. See Collier v. Legakes, supra, 98 Nev. at 310, 646 P.2d at 1220. Therefore, we conclude that petitioner is not entitled to writ relief in this regard.

Petitioner also challenges the district court's order denying without prejudice his motion to depose Joseph Constanza. The motion was apparently denied for financial reasons. Our order of August 31, 1983, which compelled the disclosure of Constanza's identity, expressly recognized the manifest significance of Constanza's testimony. In fact, we concluded that the denial of the disclosure motion was an error of constitutional magnitude. We further ordered the district court to dismiss the case pursuant

to NRS 49.365, if the state chose not to disclose Constanza's identity.[1]

Pursuant to NRS 174.175(1), the district court has the discretion to grant or deny motions to depose unavailable witnesses.[2] Under the extraordinary circumstances of this case, we conclude that the district court acted arbitrarily and capriciously by denying the motion to depose Constanza. The prosecution of this murder charge has spanned eleven years. While financial considerations are a factor, the petitioner cannot be denied meaningful access to a crucial defense witness solely on the basis of such considerations. Furthermore, at the oral argument of this petition, the state conceded that Constanza should be deposed wherever he can be located. Therefore, we conclude that petitioner is entitled to writ relief in this respect.

Finally, petitioner challenges the district court's order denying his motion for production of the police "informant's file" on Constanza. At the oral argument of this matter, the state agreed to provide petitioner's counsel with any and all information regarding Constanza. We understand that this includes information in the possession of the Las Vegas Metropolitan Police Department and specifically includes the "informant's file." Therefore, we deny as moot petitioner's request for mandamus relief to the extent he seeks an order from this court compelling production of the file.

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[1] NRS 49.365 provides:

> If the state or a political subdivision elects not to disclose the identity of an informer and the circumstances indicate a reasonable probability that the informer can give testimony necessary to a fair determination of the issue of guilt or innocence, the judge shall on motion of the accused dismiss the proceedings, and he may do so on his own motion.

[2] NRS 174.175(1) states:

> If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment . . . may upon motion of a defendant or of the state and notice to the parties order that his testimony be taken by deposition. . . .

Accordingly, we hereby order the issuance of a writ of mandamus compelling the district court to vacate its order denying petitioner's motion to take Constanza's deposition. The district court shall enter an order granting the motion to depose Constanza. However, because we have concluded that our intervention is not warranted at this time regarding petitioner's remaining challenges, we hereby deny petitioner's requests for mandamus relief in all other respects and also deny petitioner's request for habeas corpus relief. NRAP 21(b).

We note with grave concern, however, the tenor of these proceedings against petitioner. While the district attorney and his staff function as advocates within our criminal justice system, their paramount duty is to seek justice, not to convict. Berger v. United States, 295 U.S. 78, 88 (1935); ABA Standards for Criminal Justice, The Prosecution Function, § 3-1.1(c) (2d ed. 1980); Model Code of Professional Responsibility EC 7-13 (1980). We urge the district attorney's office to insure the fairness of petitioner's trial, as well as his right to pretrial discovery, and to conduct itself with the impartiality and objectivity demanded by the office.

It is so ORDERED.[3]

Springer, C. J.

Mowbray, J.

Gunderson, J.

Steffen, J.

Young, J.

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[3] We hereby vacate our order of January 17, 1985, staying the trial court proceedings. This order shall constitute our final disposition of these proceedings.

cc: Hon. Michael J. Wendell, District Judge
Hon. Brian McKay, Attorney General
Hon. Robert J. Miller, District Attorney
Gary E. Gowen
Loretta Bowman, Clerk

APP. 209

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 18963

FRANK R. LAPENA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada In and For the COUNTY OF CLARK and THE HONORABLE THOMAS A. FOLEY, District Judge of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark,

Respondents.

THE STATE OF NEVADA,

Real Party in Interest.

FILED
APR 26 1989
J. Richards
JUDITH FOUNTAIN
CLERK, SUPREME COURT

O R D E R

This petition for a writ of mandamus challenges an order of the respondent district court denying petitioner's motion for an evidentiary hearing to determine compliance with a discovery request.

It appears that petitioner has set forth arguable issues, and that petitioner may have no plain, speedy and adequate remedy in the ordinary course of law. Accordingly, the state, on behalf of respondent, shall file an answer, including authorities, against issuance of the writ, not later than twenty (20) days from the date of the filing of this order.

Further, cause appearing, we hereby stay all proceedings in Case. No. C59791 in Department XIII of the Eighth Judicial District Court pending this court's review of this petition.

It is so ORDERED.

Steffen, C. J.

J.

APP. 210

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK R. LAPENA,) No. 18963
)
Petitioner,
)
vs.
)
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE THOMAS A. FOLEY, DISTRICT JUDGE,)
)
Respondents,
)
THE STATE OF NEVADA,
)
Real Party in Interest.)
)

WRIT OF MANDAMUS

TO: The Honorable, Thomas A. Foley, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of mandamus issue,

NOW, THEREFORE, you are compelled to vacate your order denying Petitioner's motion for an evidentiary hearing to determine whether the state has complied with petitioner's discovery requests and your court's prior order to furnish the defense with all information regarding Joseph Constanza, in your case entitled, The State of Nevada vs. Frank R. La Pena, Case No. C-59791.

WITNESS The Honorables E. M. Gunderson, Chief Justice, Thomas L. Steffen, Cliff Young, Charles E. Springer and John C. Mowbray, Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 26th day of August, 1988.

Judith Fountain
Clerk

APP. 211

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK R. LAPENA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK and THE HONORABLE THOMAS A. FOLEY, District Judge of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, Respondents. THE STATE OF NEVADA, Real Party in Interest.	No. 18963

FILED

AUG 26 1988

JUDITH FOUNTAIN
CLERK, SUPREME COURT

ORDER GRANTING PETITION

FOR WRIT OF MANDAMUS

This original proceeding for a writ of mandamus challenges an order of the district court denying petitioner's motion for an evidentiary hearing to determine the state's compliance with certain discovery requests.

Petitioner's motion essentially contended that the state, in contravention of Brady v. Maryland, 373 U.S. 83 (1963), withheld material, exculpatory evidence despite his requests and a court order to produce such materials. The motion specified deficiencies in the materials the state produced, and supported these allegations with affidavits, and with responses to interrogatories and requests for admissions filed in a related federal civil action. The affidavits also detailed the materiality and exculpatory nature of the evidence allegedly withheld from the defense. The state's opposition to the motion asserted that the state had exercised its open file policy of discovery throughout the criminal proceedings, had complied with the district court's order to disclose all

intelligence reports concerning the confidential informant, and had not willfully failed to disclose the requested information. The state, however, did not support its opposition with affidavits specifically denying the statements in the petitioner's affidavits or clarifying or refuting the discovery responses in the federal suit. Consequently, we conclude that the state failed to rebut petitioner's prima facie showing that the state had not fully complied with petitioner's discovery requests and the district court's previous order to produce.

If, as petitioner contends, the state is suppressing favorable, material evidence, petitioner will be denied due process of law at his retrial. See Brady, supra. Mandamus is appropriate to prevent a constitutionally defective trial, see Smith v. Superior Court of Los Angeles County, 440 P.2d 65, 72 (Cal. 1968), or a considerable risk of irreparable harm, see Koza v. District Court, 99 Nev. 535, 665 P.2d 244 (1983). The requested evidentiary hearing should reveal any Brady violations, and thus protect petitioner from undergoing a potentially constitutionally defective trial. Additionally, petitioner faces a considerable risk of irreparable harm should the trial proceed absent the state's full disclosure of material, exculpatory evidence. Approximately eleven years have passed since petitioner's first trial resulted in a constitutionally infirm conviction and death sentence. He stands accused of a capital offense occurring almost fifteen years ago, and several witnesses crucial to his defense have since died or disappeared. Some of the reports petitioner contends the state has withheld allegedly concern prosecution interviews with these unavailable witnesses. Under the peculiar circumstances of this case, we therefore conclude that the district court arbitrarily and capriciously denied petitioner's motion for an evidentiary hearing.

ATTENTION: SHERIFF AND
UNDERSHERIFF MORAN
CAPTAIN CLERK

APP. 213

RE: HILDA KRAUSE;
Homicide DR# 74-1381

On 1-16-74 the O/R was contacted by [redacted], who stated he wanted to meet with the O/R, as he had information he did not wish to discuss over the telephone.

The O/R met with [redacted] in the parking lot of Valley High School, where he advised that he had been contacted approximately six weeks ago by a subject, who he refused to name, who asked him to help this subject, in what [redacted] believed to be the same crime which was committed on 1-14-74 wherein HILDA KRAUSE, WFA 71 years of age, 2995 Pinehurst, was murdered.

[redacted] stated herein, that at the time he was asked to help on this incident, it was his understanding that the victim HILDA KRAUSE was only supposed to receive a severe beating, and her husband MARVIN KRAUSE was supposed to be beaten, but only enough to make it obvious that he had been attacked.

[redacted] advised that no names were mentioned, and no addresses, however, the location of the crime was pretty well pin-pointed to him, and he was advised that they would have to climb a wall and it would have to be done on one of two mornings at approximately 4:30 AM, as these mornings were the only times when MARVIN KRAUSE left for work at that hour of the day.

[redacted] advised that the subject who contacted him, in his opinion, was not actually involved in the crime, however, was associated with the subjects who had actually committed the crime of murder.

He further stated that he had observed two of these subjects only briefly, describing one of them as possibly having the first name of TOM, being approximately 6'2", 240#, blond short hair, and alleged to be a former professional football player. The other subject was described only as having long black hair and a bushy black beard, also being very large in size.

- Continued -

[redacted] advised that he would attempt to get the confidence of [redacted] and would further contact the O/R if he had any additional information.

On 1-18-74, [redacted] contacted the O/R at his home, advising that he [redacted] observed a vehicle used by the suspects, at the RIB CAGE on Vegas Valley Drive, and believed it to have a Texas license plate HNG 422, stating that he was positive of the numerals, but not of the letters in the license plate.

A check with Texas D.M.V., shows this vehicle registered to a 1956 Mercury four door, owned by a LINO ESPINOZA, 15 Sun Street, San Antonio, Texas.

[redacted] advised that this vehicle was possibly tan in color, however, he stressed that he did not get a good look at it, and is only positive of the last three digits in the license number.

The O/R was advised at this time by [redacted], that there were three subjects who had committed the crime at the time MRS. KRAUSE was murdered, and that no money was taken in the robbery.

Upon contacting Lieutenant Avants of the Homicide Detail, he advised that there was in fact three suspects involved in this crime, and that from descriptions obtained from MR. KRAUSE and the large foot prints at the scene, that the suspects were in fact large in size as described by [redacted] and not even MR. KRAUSE knew that there were three suspects involved; this was determined from physical evidence at the scene.

On the evening of 1-18-74, [redacted] again contacted the O/R who at this time, identified the subject who had originally asked him to participate in the crime, as one JERRY WEAKLAND, who presently resides in apartment #476 in the Village Square Apartments on Swenson Avenue, and that he drives a late model brown over yellow Monte Carlo.

A record check on WEAKLAND, shows him to be JERRY RONALD WEAKLAND, ID #144537, described as a WMA, DOB 5-25-47 in Mt. Union, Pennsylvania, 6'0", 160#, brown hair and eyes, SSN 585-12-3761, FBI #998 421F, CII #2 294 010, with the following information:

- Continued -

3-29-73 4233 Deckow #33
3-15-73 [illegible] Palace Hotel
1-30-73 S/W Traffic
2-15-72 A.W.D.W. - Denied

10-19-73 Assault suspect, DR# 73-29711
12-7-73 Battery suspect, DR# 73-35567.

Upon checking the residence on Swenson, the above mentioned vehicle was located, and found to bear Nevada license plate CK 3254, which is registered to GAIL WEAKLAND, 1332 Serape Circle.

A record check on GAIL WEAKLAND, shows her to be our ID #173589, as GAIL WEST WEAKLAND, aka GAIL DARLENE BOSTWICK, aka GAIL DARLENE WEST, described as a WFA, DOB 1-18-47 in Arcata, California, 5'8", 135#, blond hair, blue eyes, SSN 530-36-3093, having a work application dated 10-16-72, as a waitress at the Union Plaza Hotel.

It was noted, that according to Lieutenant Avants, the vehicle used by the suspects had Uniroyal tires, and upon checking the tires on the WEAKLAND vehicle, it was noted that the left front hub cap was missing, and the vehicle tires in fact had Uniroyal tires on it.

At approximately 7:30 PM, 1-18-74, while driving by the residence of subject WEAKLAND, in an attempt to establish a surveillance and possibly locate the aforementioned vehicle bearing Texas license plates, the O/R observed a WMA and a WFA walking out of the apartment area on the sidewalk, and not knowing whether this was subject WEAKLAND, continued on out of the area, approximately one and one half blocks. The O/R then pulled into a driveway and into a vacant parking spot.

Shortly thereafter, the WEAKLAND vehicle drove up on the street adjacent to where the O/R was parked and lying in the front seat of the vehicle. The subject's vehicle stopped for a few seconds, then apparently drove around the block, came back through the area and into the private parking lot, where the O/R was still parked. He stopped directly behind the police vehicle for approximately ten seconds, then backed out of the driveway, apparently drove around the block again, drove by the immediate area where the O/R was parked, and observed the O/R seated in the police vehicle. At this time, he left the area at a rapid rate of speed.

- Continued -

Krause was to leave the apartment and that the thing was well planned. This was before the crimes were perpetrated.

After the crimes were committed, Weakland told Webb that his friend's girl friend would marry Krause and that she would pay him the money. Finally, after the crimes, Weakland told Webb that "if the police ever ask you if you know Frank, say no"; and Weakland said, "and you know who I am talking about," to which Webb replied, "yes." Webb then identified Frank as the Frank LaPena in court.

It is permissible to infer that the individuals to whom Weakland was referring in his extra-judicial statements to Webb were LaPena and Maxwell.

Although the magistrate found Webb to be an accomplice (whether this was appropriate was not presented as an issue on appeal), Webb's testimony was corroborated by Mary Bordeaux, by Gail Weakland and by officers Avants and Lee.

Maxwell told police officers Avants and Lee of her involvement with Krause, her knowledge of his wealth, Krause's proposals of marriage and her true love for Frank LaPena. The permissible inferences from her testimony tie directly to the statements made by Weakland to Webb and support the conspiracy theory of the state.

[Headnote 3]

All of the foregoing "tends to connect" LaPena and Maxwell with the crimes charged. The hearsay statements of Weakland to Webb are admissible under Goldsmith v. Sheriff, supra, and not "testimony" of an accomplice within NRS 175.291.

The witnesses who testified corroborating Weakland's testimony do not appear to have been motivated by self-serving purposes. For example, Weakland's ex-wife, Gail, had often been beaten up by him, three times severely enough to cause her to be hospitalized. The most recent such incident occurred at the time of the events surrounding the Krause murder and robbery. It is doubtful that she would shade her testimony to favor him.

[Headnote 4]

Although Weakland's participation in these crimes may have warranted a more serious charge than second-degree murder, plea bargaining is permissible. Until legislatively forbidden, or otherwise, his testimony in exchange for a lesser accusation carries whatever weight a magistrate or jury want to give it. For our present purposes the evidence as related is inculpatory and corroborative.

Affirmed.

MOWBRAY and THOMPSON, JJ., concur.

GUNDERSON, C. J., with whom BATJER, J., agrees, dissenting:

Justice Batjer and I believe that the record before us lacks evidence which, in the legal sense, "corroborates" the accomplice testimony adduced against appellants LaPena and Maxwell. Accordingly, we would reverse the district court's order denying them habeas relief, and order appellants discharged unless the State, believing further evidence of a legally corroborative character to be available, should elect to re-charge them within a specified period of time.

Prefatory Comment

To obtain evidence to charge appellants Frank LaPena and Rosalie Maxwell as principals in the robbery of Marvin and Hilda Krause, and in the capital murder of Hilda Krause, the prosecution has bargained for testimony from the admitted actual robber and killer, Gerald Weakland, and from his acknowledged accomplice Robert Webb.[1]

Although NRS 200.030(5) expressly declares the death penalty mandatory for capital murder, in an extra-statutory exercise of discretion the prosecution agreed to charge Weakland merely with second degree murder, to withhold related robbery charges, and in addition to drop other charges arising from additional, unrelated crimes. (As hereinafter noted, Weakland's accomplice, Robert Webb, struck an even better bargain.) Thus, it seems, the actual killers have been induced to identify LaPena and Maxwell as persons who instigated their own criminal acts, ostensibly so that Maxwell could marry Krause and, with her lover LaPena, enjoy Krause's money.

I will not now address numerous questions potentially concerned in such prosecutorial conduct.[2] At this time, I consider only the issue the majority treat, i.e., whether the testimony of

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[1]The now incumbent District Attorney was not serving in that office when the bargain referred to was entered.

[2]One must, of course, note concern regarding the propriety of the prosecution's conduct, not only because it seems clearly to contravene our Legislature's mandate, but also because, in so doing, it may also violate the United States Supreme Court's edict against "wanton and freakish" applications of the death penalty. See: Furman v. Georgia, 408 U.S. 238, 310 (1972), Stewart, J., concurring. However, we need not reach such considerations; nor do I here consider whether the purchase of testimony, through a bargain so disproportionate, violates due process of law.

Weakland and Webb has been duly corroborated, as NRS 175.291 requires.

Application of NRS 175.291; In General

Enunciating the test to be utilized in applying NRS 175.291, this court has declared, consistently with authority elsewhere:

"Under statutes such as NRS 175.291 it is commonly held that 'corroborative evidence is insufficient when it merely casts a grave suspicion upon the accused.' Peope v. Shaw, 112 P.2d 241, 255 (Cal. 1941), and cases there cited; Cooper v. Territory, 91 P. 1032 (Okla. 1907). As the California Supreme Court said in People v. Shaw, supra, citing numerous authorities:

" 'The difficulty comes in determining what corroboration is sufficient. First, we must eliminate from the case the evidence of the accomplice, and then examine the evidence of the remaining witness or witnesses with the view to ascertain if there be inculpatory evidence,—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him.' Id., at 255; emphasis in original.

"This seems the approach the courts have uniformly taken to application of statutes like NRS 175.291; indeed, it seems the only approach available. How else may we implement the legislative edict that there must be corroborative evidence 'which *in itself*' tends to connect the defendant with the commission of the offense '*without* the aid of testimony of the accomplice'? How else may we honor the legislative mandate that 'corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof'?

"Implicitly recognizing the propriety of the afore described approach to application of NRS 175.291, this court held in Ex Parte Hutchinson, 76 Nev. 478, 357 P.2d 589 (1960), that an accomplice was not sufficiently corroborated, even to show probable cause to hold for trial, merely by showing the defendant was with the accomplice near the scene of the crime on the night it was committed, at the time the accomplice testified they committed it in concert. . . ." Austin v. State, 87 Nev. 578, 585, 491 P.2d 724, 728–729 (1971).

Having called to mind this firmly established approach which NRS 175.291 mandates, I now propose to eliminate from consideration testimony of the established accomplices and then, in

fidelity to the legislative command, determine whether any of the remaining evidence alluded to in the majority opinion constitutes "corroboration" in the legal acceptation of that term.

Details Concerning the Crime's Commission and Circumstances

By its express terms, NRS 175.291 does not merely mandate that "corroboration," to be legally sufficient, must in itself have independent inculpatory significance "without the aid of the testimony of the accomplice." The Legislature went on to provide, most explicitly, that "corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof." It is, of course, not for this Court to question the wisdom of this provision, which in any event has a logical basis, grounded in legal history and precedent. As this Court noted in Austin v. State: "A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the person, that is really no corroboration at all." 87 Nev. at 584, n. 7, 491 P.2d at 728, quoting Lord Abinger, C. B., in R. v. Farler, 8 C. & P. 106 (1837). This court also noted "that 'ex concesso' an accomplice was concerned in the crime and [knows] all the facts . . ." Id., quoting Bushe, C. J., in R. v. Sheehan, Jebb 54, 57 (1826). Clearly, many facts which Weakland has related, possibly quite accurately, establish no more than this: a criminal's knowledge of his own crime.

For example, Weakland testified that among the items he and Boutwell took from the Krause home were a TV set, a watch and a ring. The prosecution does not suggest that either LaPena or Maxwell ever were connected to this loot in any way whatever. In fact, as the majority opinion notices, apparently Weakland turned over to a friend and to his brother—not to LaPena or Maxwell—a ring and watch answering the description of the Krause jewelry. Arguably, the fact that Weakland's friend and brother may have received stolen property would be independent evidence tending to connect them to the commission of the offense. However, neither the fact that Weakland stole the jewelry, nor the fact that Weakland delivered it to his friend and brother, tends to inculpate LaPena or Maxwell any more than it would inculpate anyone else Weakland might agree to accuse to buy his life and freedom.[3] Purely and simply, these

[3]Weakland testified that, ultimately, he retrieved the ring and gave it to LaPena, unlikely testimony for which, in any event, there is no confirmation whatever. It also is worth noting that, apparently contradicting Weakland, Webb testified to getting rid of evidence, by throwing "the watches and ring" into a garbage can.

are merely circumstances of the crime which, in Lord Abinger's words, do not identify the person accused at all.

Returning to the TV set, it seems from the testimony of Gail Weakland that, when Weakland borrowed her automobile on the night of the murder-robbery, the car's headliner was intact; but upon return, it was ripped. Again, this circumstance may coincide with Weakland's statement that he and Boutwell ripped the headliner when transferring the Krause TV set into Gail Weakland's car; however, it obviously lacks any independent inculpatory significance so far as LaPena and Maxwell are concerned. The prosecution does not suggest LaPena and Maxwell have been connected either to the TV set or to the rip in the headliner, in any way at all. Indeed, according to the majority's view of the facts, Weakland first took the TV set to Sandra Weakland's home—which would inculpate Sandra if anyone. Later, my brethren say, fearing that Weakland was under police surveillance, Weakland's brothers apparently took the TV from Sandra's home and destroyed it—facts which, if true, might tend to inculpate the brothers, but certainly not LaPena or Maxwell.[4]

Similarly, according to Weakland, he received from Rosalie Maxwell a hand-drawn map of streets near the Krause residence, which he thereupon copied and destroyed. In other words, Weakland says he had a map, the origin of which he and he alone attributed to LaPena and Maxwell. While Gail Weakland testified she once saw Weakland with what appeared to be a hand-drawn map, her testimony fails even to relate it to the Krause crime, and in no way whatever establishes that either LePena or Maxwell had anything to do with its origins.

Facts Related Neither To The Crime Nor To Appellants

Of even less force to inculpate LaPena or Maxwell is Gail Weakland's testimony that, around January 2, Weakland had some $1,000 in $100 bills. Although the majority omit to mention it, Gail further testified that Weakland had said he had won the money gambling. Instead of suggesting that this explanation was suspect in any way, Gail confirmed that Weakland was indeed a heavy gambler. Thus, far from relating the money to

[4]As I read the record, the TV set assertedly went first to a condominium occupied by Webb, Boutwell and Mary Beth Bordeaux, on the morning of the crime. Then, as he became fearful of discovery, Weakland and his brother Leo took the TV set from the condominium, and took it to Gordon and Sandra's home. I do not recall that the record reflects destruction of the TV set; however, in any event, certainly no one contends that either of the appellants destroyed it.

LaPena or Maxwell, or to the Krause crime, it would be altogether speculative to assume from Gail Weakland's testimony that the money had a relationship to a criminal endeavor by anyone.

Evidence of Friendship and Association

Even evidence of close association and friendship with an acknowledged wrongdoer will not corroborate his accusation. Eckert v. State, 91 Nev. 183, 533 P.2d 468 (1975); Austin v. State, 87 Nev. 578, 491 P.2d 724 (1971); Ex Parte Hutchinson, 76 Nev. 478, 357 P.2d 589 (1960).

Here, of course, it seems clear that Weakland had a friendly relationship with LaPena and was acquainted with Maxwell. It would appear, for example, that LaPena may have telephoned Weakland occasionally at the home of his sister-in-law, Sandra, with whom he was residing. If so, he did not act furtively, but left messages using his true first name, "Frank." It also appears that, at a time prior to the robbery-murder, Gail Weakland waited in the car while Weakland went briefly into Rosalie Maxwell's townhouse. What happened inside—who was there—Gail does not know. Gail also testified that on one occasion, not two as the majority state, Weakland sent her to LaPena for money: two $20 bills and one $10 bill, or a total of $50. At one time, Weakland told one of his brothers that if he needed money, he could get it from Frank. Obviously, such testimony indicates no more than association or friendship.

This is true with other aspects of the evidence. For example, it appears that, during a weekend at Lake Havasu following the murder, Weakland made two phone calls to Las Vegas—one, he says, to his mother and the other to LaPena. Assuming such a call to LaPena were independently proved, it would inculpate LaPena no more than it inculpates Weakland's mother. And obviously, not even a prosecutor could think such calls inculpatory of Maxwell.

Of course, from Gail's testimony it does appear that at a time subsequent to the murder-robbery, Weakland caused Gail to deliver a pair of weighted black leather gloves to the Hacienda Hotel, where LaPena took them from her furtively. I do not, however, perceive that this fact has been independently related to the crime for which these appellants will stand trial for their lives. In the first place, for purposes of another prosecution, the State's theory is that LaPena delivered the gloves to Weakland for use in beating the Hacienda Hotel's manager, that Weakland so used them, then caused their return. See: LaPena v. Sheriff, 91 Nev. 692, 541 P.2d 907 (1975). Thus, the State has explained the transfer of the gloves, relating them to another

totally different crime, which Weakland also committed and later attributed to LaPena. The prosecution here desires, however, to make the gloves do double evidentiary service, which it appears to me cannot be done; for dropping out Weakland's testimony, the record fails to show that either Krause was beaten, with weighted gloves or otherwise. The gloves simply are not shown, except through accomplice testimony, to have any relationship whatever to the offense here concerned. Furthermore, not only do the gloves lack independent value to connect LaPena with the offense in question; they have, moreover, not been related to Maxwell in any way.

Testimony of Weakland's Accomplice, Webb

From the record, it appears that Robert Webb participated with Weakland in planning the murder and robbery in question, although he restricted his participation to aiding and abetting Weakland, both before and afterward. Webb assisted Weakland in procuring the participation of Boutwell, whom Webb supplied with the gloves and jacket—and, some evidence indicates, the boots also—which Boutwell used in the crimes at the Krause residence. Webb knew these items would be used in the robbery-murder, which he helped to plan. After the crimes, and knowing of them, Webb aided and abetted Weakland by secreting evidence taken from the Krause residence. Thus, under such circumstances, it is evident that the magistrate not only was correct in finding Webb an accomplice, but might have been in error if he had found anything else. See: NRS 195.020; State v. Cushing, 61 Nev. 132, 120 P.2d 208 (1941); State v. Chapman, 6 Nev. 320 (1871).[5]

[5]NRS 195.020 provides:

"Who are principals. *Every person concerned in the commission of a felony,* gross misdemeanor or misdemeanor, *whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent;* and *every person who, directly or indirectly, counsels,* encourages, hires, commands, *induces or otherwise procures another to commit a felony,* gross misdemeanor or misdemeanor *is a principal,* and shall be proceeded against and punished as such. . . ." Emphasis added.

In State v. Cushing, cited above, this court expressly stated that, under our statutes, "it is only necessary in such case to show that a crime has been committed, and that the defendant, if present, aided and assisted, or, if not present, advised and encouraged it." 61 Nev. at 145; 120 P.2d at 215.

The magistrate determined Webb was an accomplice, which clearly was within his province. State v. Fuchs, 78 Nev. 63, 368 P.2d 869 (1962); In Re Oxley and Mulvaney, 38 Nev. 379, 149 P. 992 (1915);

Although Webb also might have been prosecuted for capital murder, the prosecution permitted him to plead guilty to a gross misdemeanor, with a recommendation of probation, and he is now free. On his part, Webb has by his testimony undertaken to assist the prosecution in convicting LaPena and Maxwell of a capital offense. Again, I refrain from considering the Constitutional implications of this exchange, so highly favorable to Webb. I consider only whether Webb's testimony can be viewed as corroborating Weakland's.

It is true, of course, that hearsay statements of one co-conspirator to another are admissible, and may be considered as evidence under an exception to the hearsay rule once the conspiracy is proved. NRS 51.035(3)(e); Goldsmith v. Sheriff, 85 Nev. 295, 454 P.2d 86 (1969). However, if the hearsay statements of one accomplice-conspirator, such as Weakland, are only established through the testimony of a second accomplice-conspirator, such as Webb, then it is clear such statements may not be viewed as "corroborating evidence" that a third person, such as LaPena or Maxwell, is also part of the conspiracy. *Goldsmith* does not suggest otherwise; instead, it explicitly declares that, "before those hearsay statements can be considered by the magistrate it is incumbent upon him to examine all the other evidence to determine whether, aliunde, the existence of a conspiracy was established." 85 Nev. at 304; 454 P.2d at 92. As I am sure the majority know, and as Justice Traynor recognized in People v. Clapp, 151 P.2d 237 (Cal. 1944), citing numerous authorities, "the testimony of one accomplice is not corroborated by that of another." Id. at 238; in accord, State v. Banks, 486 P.2d 584 (1971); People v. Jehl, 310 P.2d 495 (Cal.App. 1957); State v. Hilbish, 59 Nev. 469, 97 P.2d 435 (1940); VII Wigmore on Evidence, § 2059 (3rd Ed. 1940). Only this fall, our court again recognized the viability of this rule. See: LaPena v. Sheriff, 91 Nev. 692, 541 P.2d 907 (1975). Thus, since the only evidence of Weakland's supposed extra-judicial statements is testimony from Webb, and since Webb's testimony like Weakland's must be eliminated from consideration when deciding whether the prosecution has satisfied NRS 175.291's requirement of corroboration, it is

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Ex Parte Wm. Willoughby, 14 Nev. 451 (1880). I presume the majority do not question the foregoing authorities. We most recently recognized their force only three months ago in State v. Havas, 91 Nev. 611, 540 P.2d 1060 (1975), there invoking them against a defendant, and holding that both the district courts and this court are bound by magistrates' factual determinations.

patent that Webb's story of what Weakland said has no more significance than his direct accusation of LaPena or Maxwell would have.

Relationship of LaPena, Maxwell, and Krause

Impermissibly, the majority opinion has drawn upon Weakland's story to establish in LaPena and Maxwell a motive to kill Mrs. Krause. Virtually none of the "facts" concerning this supposed motive find any support in the record, save through testimony of the self-acknowledged participant, Weakland.

It does appear, of course, that the Maxwell woman was a lady of doubtful morals, who admitted regarding Krause as her "live one" and LaPena as her "true lover." Physically, she accommodated Krause; monetarily, he assisted her. On its face, however, there is nothing about their symbiotic relationship, however contrary to accepted conventions, which suggests a motive to have Krause beaten and Mrs. Krause murdered.

Only through the testimony of accomplices Weakland and Webb is a somewhat unlikely motive attributed to LaPena and Maxwell. Supposedly, LaPena and Maxwell believed Krause was quite wealthy, and decided killing Mrs. Krause would set in motion a house-that-Jack built chain of events enabling them to enjoy more of Krause's money than before. According to the story the prosecution elicited by allowing life and freedom to the two acknowledged participants, Weakland and Webb, LaPena believed that if he had Mrs. Krause killed, Krause would then marry Maxwell; that Maxwell could then induce Krause to supply her greater sums of money; and that he, LaPena, would then share the increased take. Unlike the situation revealed in LaPena v. Sheriff, supra, however, nothing tending independently to establish this motive appears in the record.

Summary

I recognize, of course, that several items of evidence, not by themselves inculpatory, may in combination independently establish facts constituting legal corroboration. Cf. LaPena v. Sheriff, cited above. I also recognize that several items of evidence, by themselves only remotely inculpatory, may in their totality rise to the dignity of legal corroboration. Cf. People v. Trujillo, 194 P.2d 681 (Cal. 1948). I further recognize, however, that nothing plus nothing plus nothing is nothing.

As my brother Zenoff said, speaking for a unanimous court in Eckert v. State, 91 Nev. 183, 186, 533 P.2d 468, 471 (1975): "Evidence to corroborate accomplice testimony does

not suffice if it merely casts grave suspicion on the defendant." And as Lord Abinger has said: "It is a practice which deserves all the reverence of the law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material particular. . . . The danger is that when a man is fixed, and knows that his own guilt is detected, he purchases immunity by falsely accusing others." R. v. Farler, 8 C. & P. 106 (1837).

I suggest that Lord Abinger's observation is apposite, not just as to those who are clearly "fixed," such as Weakland and Webb, but also to persons like Gail Weakland and Mary Bordeaux whose proximity and possible complicity in the crime is manifest, but whose guilt is not certain. I do not, of course, suggest that these women necessarily were accomplices in the legal sense. Since their complicity is not now definitely established, that will be a question of fact to be determined at trial. Cf. Austin v. State, 87 Nev. 578, 591 P.2d 724 (1971).

For present purposes, I presume, despite the women's obvious involvement with Weakland and Webb in events of the murder-robbery and ensuing efforts to escape justice, that Gail Weakland and Mary Bordeaux did not know a murder was to be committed until after it occurred.[6] I do, however, challenge the majority's dicta that there is no reason to question Gail Weakland's veracity. She and the Bordeaux woman have the same reason as Weakland and Webb have to testify as the prosecution desires. Beyond this, as a matter of logic, I question that Weakland's frequent beating and hospitalization of Gail Weakland makes it "doubtful that she would shade her testimony to favor him." I note that, after the mentioned beatings, Gail nonetheless let Weakland utilize her car on the night of the murder-robbery, and left town with him afterward.

Even fully crediting those not definitely shown to be accomplices, much of the record consists of testimony which proves only that Weakland is able to relate, with some measure of accuracy, details of his own vicious crime. The rest of the ostensible corroboration presented by the State, in itself,

[6]I note, however, that at least the Bordeaux woman—who was with Weakland and Webb immediately before the murder-robbery, received some of the loot, and helped destroy evidence afterward—has expressly been promised total immunity to induce her testimony against LaPena and Maxwell. Apparently, tacitly or otherwise, the prosecution also is committed not to prosecute the Weakland woman, who supplied the car used for the murder-robbery, and left with Weakland for Lake Havasu when he became fearful of discovery.

achieves no more than to prove, redundantly, that LaPena and Weakland were friends or associates. Ignoring Weakland's testimony, the testimony of one Fish (which the magistrate rejected as unworthy of belief), and the testimony of witness Webb (whom the magistrate found as a fact to be an accomplice), I therefore think the record shows only that LaPena and Maxwell are amoral persons, who consort with their own kind, including persons like Weakland.

LaPena, a hotel bell captain, has lived with Maxwell, who apparently has slept with Krause and taken as much of his money as she could get. In themselves, however, these facts suggest no reason for either of them to pay Weakland to rob Krause and murder his wife. It does appear that, around the time of the Krause murder, certain weighted black gloves passed between Weakland and LaPena; however, except through the testimony of Weakland and Webb, those gloves cannot be associated with the crimes here concerned. It is, in fact, the prosecution's theory that the gloves in question were particularly related to a different crime, which is concerned in another case before us. In the instant case, the record does not show that either Marvin or Hilda Krause was beaten, or that any plan ever existed that such would be done.

Had the magistrate not found Fish's testimony incredible, had he not determined Webb was an accomplice, and had the prosecution proved, independently of accomplice testimony, that appellants paid Weakland a large sum of money (as the prosecution tried and failed to do), then of course a substantially different question might be presented.

It seems clear that, upon the present record, by virtue of NRS 175.291, there is insufficient evidence to hold appellants to answer for the crimes with which they stand charged in this case. Thus, the order denying habeas corpus should be reversed. As to such charges, appellants should stand discharged unless the State, believing further corroborative evidence to be available, should elect to re-charge them within a specified period of time.

Frank Ralph LaPENA, Appellant,

v.

The STATE of Nevada, Respondent.

No. 10009.

Supreme Court of Nevada.

April 13, 1982.

Defendant was convicted in the Eighth Judicial District Court, Clark County, J. Charles Thompson, J., of robbery with the use of a deadly weapon and first-degree murder, and he appealed. The Supreme Court, Springer, J., held that convictions would be reversed where prosecution's case depended substantially upon out-of-court statements and preliminary examination testimony obtained from purported accomplice who testified pursuant to executory conditional plea bargain.

Reversed and remanded.

Manoukian, J., dissented and filed opinion.

Criminal Law ⇐1169.1(1)

Convictions of robbery and first-degree murder would be reversed where prosecution's case depended substantially upon out-of-court statements and preliminary examination testimony obtained from purported accomplice who testified pursuant to executory conditional plea bargain.

Wiener, Goldwater, Waldman & Gordon, Ltd., Richard A. Wright, Las Vegas, for appellant.

Richard Bryan, Atty. Gen., Carson City, Robert J. Miller, Dist. Atty., Las Vegas, for respondent.

OPINION

SPRINGER, Justice:

Frank LaPena has appealed from convictions of robbery and first degree murder. The convictions are reversed because the prosecution's case depended substantially upon out-of-court statements and preliminary examination testimony obtained from a purported accomplice, Jerry Weakland, who testified pursuant to an executory conditional plea bargain.

Weakland was apprehended for the robbery and murder of Hilda Kraus. He ultimately admitted that he had robbed the woman and killed her. At the time of Weakland's preliminary examination, he agreed to cooperate with the prosecution by implicating appellant LaPena. In exchange for his testimony that LaPena had contracted with him for the murder, Weakland was to be allowed to plead guilty to second degree murder and receive a sentence of five years to life imprisonment. Under the agreement, robbery and all other charges were to be dropped, including charges unrelated to the subject incident.

Weakland testified at LaPena's preliminary examination, incriminating LaPena in accordance with his previous statements to prosecuting officials. Thereafter the state kept its bargain. Weakland pleaded guilty to second degree murder and received the promised sentence. All other charges were dismissed.

Weakland was subsequently called to testify at LaPena's trial. He stated under oath that his testimony at LaPena's preliminary examination and his prior statements to the prosecution were untrue; he said that he had incriminated LaPena under pressure from the police to do so. Weakland refused to testify any further concerning LaPena's alleged involvement in the robbery and murder. The trial court later admitted into evidence Weakland's prior testimony and his previous written and videotaped statements to police officials.

The trial court committed reversible error by admitting into evidence Weakland's statements incriminating LaPena. The admission into evidence violated the rule established in *Franklin v. State*, 94 Nev. 220, 577 P.2d 860 (1978) and reaffirmed in *Burns v. State*, 96 Nev. 802, 618 P.2d 881 (1980). In those decisions we disapproved the practice of withholding the benefits of a plea

bargain or promise of leniency until after a purported accomplice had testified in a particular manner. We see no meaningful distinction between the facts of this case and *Franklin*. The prosecution did not permit Weakland to reap the benefit of his bargain until after he had incriminated LaPena at the preliminary examination. The plea bargain was thereby used to induce cooperation. At trial Weakland said as much, claiming to have been coerced into making the incriminating statements. Since the prosecution relied substantially on Weakland's incriminating statements in developing its case against LaPena, we cannot find the improper admission of evidence harmless beyond a reasonable doubt. *See Burns, supra.*

Accordingly, the judgment of conviction is reversed.

GUNDERSON, C. J., MOWBRAY, J., and ZENOFF, Senior Justice,[1] concur.

MANOUKIAN, Justice, dissenting:

I cannot agree with the majority that "the trial court committed reversible error by admitting into evidence Weakland's statements incriminating LaPena." My bases for disagreement are clearly set forth in my separate opinions in *Franklin v. State*, 94 Nev. 220, 227, 577 P.2d 860, 864 (1978) (Manoukian, J., dissenting, with Mowbray, J.) and *Burns v. State*, 96 Nev. 802, 806, 618 P.2d 881, 884 (1980) (Manoukian, J., concurring).

I would affirm the judgment of conviction.

1. The Chief Justice designated Hon. David Zenoff, Senior Justice, to sit in this case in place of the Hon. Cameron Batjer. Nev.Const. art. 6 § 19; SCR 10.

the judgment, the trial itself [is] contaminated. An appellant whose right to a fair trial in a trial court has been vitiated should be accorded that right anew. Retrial is a small price to pay for insuring the right to a fair trial.[1]

Reversed and remanded for new trial.

LEON EUSTORGIO MORALES, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 10971

August 19, 1980 615 P.2d 254

Appeal from judgments of conviction upon pleas of guilty, Eighth Judicial District Court, Clark County; J. Charles Thompson, Judge.

Pursuant to his plea of guilty, defendant was convicted in the district court of sale of controlled substance and possession of controlled substance. Defendant was sentenced to serve a term of 20 years on the sale charge and a concurrent term of six years on the possession charge. On appeal, the Supreme Court held that: (1) although judge's remarks may have been unfortunate, there was no reversible error in considering defendant's status as an alien in imposing sentence, and (2) judge did not impermissibly consider allegation that defendant was a revolutionary and an international drug dealer in imposing sentence.

Affirmed.

Morgan D. Harris, Public Defender, Clark County, for Appellant.

Richard Bryan, Attorney General, Carson City, and *Robert Miller,* District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
Although judge's remarks may have been unfortunate, there was no reversible error in considering defendant's status as an alien in imposing sentence.

2. CRIMINAL LAW.
So long as record does not demonstrate prejudice resulting from consideration of information or accusations founded upon facts supported only by impalpable or highly suspect evidence, reviewing court will refrain from interfering with sentence imposed.

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[1]R. Traynor, The Riddle of Harmless Error 20, 22 (1970).

3. CRIMINAL LAW.
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Per Curiam:

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It is asserted that the reception of this inadmissible evidence is not harmless error as it denied appellant his right to a fair trial. NRS 178.598 defines harmless error as that which does not affect substantial rights. Although NRS 178.598 does not provide a standard for determining when errors are harmless, this court has established certain guidelines to be followed in exercising its discretion. These include whether the issue of innocence or guilt is close, the quantity and character of the error and the gravity of the harm charged. Underlying each of these factors is the "supervisory function of the appellate court in maintaining the standards of the trial bench and bar, to the end that all defendants will be accorded a fair trial." Garner v. State, 78 Nev. 366, 374 P.2d 525 (1962).

A review of the record reveals that the evidence is not overwhelming. Weakland made three statements implicating Maxwell and LaPena. These statements were corroborated in part by Weakland's wife and two of Weakland's friends. Weakland subsequently repudiated his testimony, under oath, at the LaPena and Maxwell trials.

In this case, the error was repeated with the admission of each prior statement and trial transcript into evidence. The details of the murder, while not expounded upon by the state, were nevertheless argued to the jury at the close of the case. Further, the nature of the error (the admission of the details of the killing) is inherently harmful to one charged with perjury arising from such a crime. Contrary to respondent's contention, the repeated description of the murder did more than provide a backdrop of reality against which the defendant's false statements could be weighed. Instead, they impressed upon the jury that appellant Weakland was a cold-blooded killer—in addition to being a liar. In determining whether Weakland committed perjury at the LaPena and Maxwell trials as the state charged, the jury may well have been influenced by this reception of inadmissible evidence.

We conclude that the judgment below must be and is reversed and the sentence vacated and the cause remanded for a new trial. As stated by Justice Traynor,

> [The] litigant has a right to objective consideration of all proper evidence by triers of fact without violations of any substantial rights he may have as a litigant. He is entitled not to a trial free of all possible error but to a trial free of harmful error.
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> . . . [Where] the error is so forceful as to leave its mark on

the killing of Hilda Kraus. In connection with his plea, Weakland made a written and videotaped statement implicating Rosalie Maxwell and Frank LaPena. At the preliminary hearing for Maxwell and LaPena, Weakland repeated his statement, testifying that he was hired by Maxwell and LaPena to kill Kraus. Weakland later repudiated these statements at the Maxwell and LaPena trials, asserting that neither Maxwell nor LaPena was involved in the killing. The state subsequently charged that Weakland committed perjury when he denied LaPena's and Maxwell's involvement in the Kraus killing. After a trial to a jury, Weakland was convicted of two counts of perjury.

Although Weakland makes numerous assignments of error in this appeal, his primary argument involves the admission of the prior testimony and statements of himself and the victim's husband, Mr. Kraus. It is Weakland's appellate contention that such admissions were reversible error as the statements and transcripts of the testimony contained much irrelevant and cumulative information. We agree and believe the judgment of conviction must be reversed and the cause remanded for new trial.

[Headnotes 1, 2]

Over vigorous objection by appellant's counsel, the district court admitted the complete transcripts of appellant Weakland's previous testimony and statements as well as those of the victim's husband, Mr. Kraus. Each of the transcripts contained a detailed description of the actual killing of Hilda Kraus which appellant's counsel sought to exclude as irrelevant and highly prejudicial. The district court ruled that such information was relevant as the "acts surrounding the murder were so inextricably entwined with the charge as to be not susceptible of separation." NRS 48.015 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evidence relating to a crime other than that for which the appellant is on trial is relevant where it tends to show the false swearing of the appellant. State v. Cerfoglio, 46 Nev. 332, 205 P. 791, 213 P. 102 (1923). In this case, however, it is the participation of LaPena and Maxwell in arranging the murder, rather than the details of the actual killing, which gives rise to the perjury charges. Thus, those portions of the transcripts and statements which describe the commission of the crime are irrelevant and their admission clearly error. NRS 48.025(2).

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GERALD RONALD WEAKLAND, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 10985

August 18, 1980 615 P.2d 252

Appeal from judgment of conviction for perjury; Eighth Judicial District Court, Clark County; Paul S. Goldman, Judge.

The Supreme Court, held that where it was participation of two persons in arranging murder committed by defendant, rather than the details of the actual killing, which gave rise to perjury charges after defendant, at the trial of the other persons, repudiated statements that he was hired by such persons to do the killing, portions of prior transcripts and statements which described the commission of the crime were irrelevant, and admission of statements and transcripts containing detailed description of the murder was reversible error.

Reversed and remanded for new trial.

Morgan D. Harris, Public Defender, and *Terrance M. Jackson,* Deputy Public Defender, Clark County, for Appellant.

Robert J. Miller, District Attorney, and *David Swartz,* Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   In perjury prosecution, evidence relating to a crime other than that for which defendant is on trial is relevant where it tends to show the false swearing of the defendant.
2. CRIMINAL LAW.
   Where it was participation of two persons in arranging murder committed by defendant, rather than the details of the actual killing, which gave rise to perjury charges after defendant, at the trial of the other persons, repudiated statements that he was hired by such persons to do the killing, portions of prior transcripts and statements which described the commission of the crime were irrelevant, and admission of statements and transcripts containing detailed description of the murder was reversible error. NRS 48.015, 48.025, subd. 2, 178.598; U.S.C.A.Const. Amend. 6.
3. CRIMINAL LAW.
   Guidelines for determining when trial errors are harmless include whether issue of innocence or guilt is close, quantity and character of the error, and the gravity of the harm charged, and underlying each of these factors is the supervisory function of the appellate court in maintaining the standards of the trial bench and bar, to the end that all defendants will be accorded a fair trial. NRS 178.598.

OPINION

Per Curiam:

Gerald R. Weakland pled guilty to second degree murder for

The STATE of Nevada, Appellant/Cross-Respondent,

v.

Frank LaPENA, Respondent/Cross-Appellant.

No. 29429.

Supreme Court of Nevada.

Dec. 7, 1998.

Defendant, whose conviction for first-degree murder and robbery were affirmed on appeal, filed petition for postconviction relief and motion to dismiss indictment. The District Court, Clark County, Gene T. Porter, J., granted petition and denied motion. State appealed and defendant cross-appealed. The Supreme Court, Rose, J., held that: (1) counsel were not ineffective in their impeachment of informant in murder prosecution; (2) defendant made informed, strategic choice not to testify; (3) counsel's failure to procure informant's testimony did not constitute ineffective assistance; and (4) counsel was not ineffective in failing to pursue alleged connection between person who admitted he was hired by defendant to murder victim and victim's husband.

Reversed.

Springer, C.J., dissented and filed opinion.

1. Criminal Law ⇐1134(3)

The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact, and thus, is subject to independent review. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.13(1)

To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐641.13(1)

To show that counsel's deficient performance prejudiced the defense, for the purpose of an ineffective assistance of counsel claim, the defendant must show that but for counsel's mistakes, there is a reasonable probability that the result of the proceeding would have been different. U.S.C.A. Const. Amend. 6.

4. Criminal Law ⇐641.13(1)

Judicial review of counsel's representation is highly deferential, for the purpose of an ineffective assistance of counsel claim. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.13(1)

A defendant must overcome the presumption on an ineffective assistance of counsel claim that a challenged action might be considered sound strategy. U.S.C.A. Const. Amend. 6.

6. Criminal Law ⇐641.13(6)

Counsel were not ineffective in their impeachment of informant in murder prosecution; although informant was not impeached using agreement with law enforcement officials to testify in exchange for ceasing to sabotage informant's efforts to get paroled, counsel made substantial efforts to impeach informant with bad acts, prior perjury convictions and numerous inconsistencies between informant's testimony and physical evidence. U.S.C.A. Const.Amend. 6.

7. Witnesses ⇐88

Murder defendant made informed, strategic choice not to testify in second trial, where parties conceded that defendant was aware of right to testify, that defendant voluntarily waived that right and that testimony went poorly at first trial.

8. Criminal Law ⇐641.13(6)

Certain witnesses were not called to testify in second murder trial based upon strategic reasoning made after reasonable investigation, and thus, counsels' failure to call witnesses did not establish ineffective assistance of counsel, where defendant did not elaborate on what witnesses' testimony might have been, one witness refused to testify in first trial, and counsel stated that

witnesses were not as important as defendant thought. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐641.13(6)

Murder defendant could not show that informant's presence at trial would have likely produced different result, and thus, counsel's failure to procure informant's testimony did not constitute ineffective assistance, where all evidence with regard to informant was properly presented in murder defendant's trials. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(6)

Murder defendant failed to show prejudice by counsel's failure to obtain information in prior counsel's possession regarding informant, and thus, defendant could not establish ineffective assistance of counsel, where defendant failed to present evidence that substance of informant's conversation with prior counsel would have provided any additional information not previously presented to jury. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐641.13(6)

Counsel was not ineffective in failing to pursue alleged connection between person who admitted he was hired by defendant to murder victim and victim's husband, where efforts were made to uncover connection and there was overwhelming evidence that defendant hired person to murder victim. U.S.C.A. Const.Amend. 6.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney; and James Tufteland, Chief Deputy District Attorney, Clark County, for Appellant/Cross–Respondent.

David M. Schieck, Las Vegas, for Respondent/Cross–Appellant.

OPINION

ROSE, J.

In 1977, respondent/cross-appellant Frank LaPena was convicted of first degree murder and robbery with the use of a deadly weapon. This court reversed the conviction and remanded for a new trial. In 1989, LaPena was again convicted of first degree murder and robbery, and sentenced to life imprisonment without the possibility of parole. This court affirmed the conviction. In 1992, LaPena filed a petition for post-conviction relief (the "PCR petition"), which the district court denied; this court remanded the case for an evidentiary hearing. In December 1993, LaPena filed a motion to dismiss all of the charges against him. In 1995, the district court conducted an evidentiary hearing and, based on the evidence adduced therein, granted LaPena's PCR petition on the ground that LaPena had been denied effective assistance of trial counsel. The district court denied LaPena's motion to dismiss and ordered a new trial.

The State appeals from the district court's grant of post-conviction relief vacating LaPena's conviction and sentence. LaPena cross-appeals from the district court's denial of his motion to dismiss all charges against him. We conclude that the district court erred in granting LaPena's PCR petition. Consequently we reverse the district court's order and dismiss LaPena's cross-appeal.

FACTS

At approximately 5:00 a.m. on January 14, 1974, the elderly couple of Hilda and Marvin Krause were robbed at their Las Vegas home located inside a walled country club community. During the course of the robbery, the perpetrators beat Mr. Krause and murdered Mrs. Krause. When police arrived at the Krause home, they found the deceased Mrs. Krause gagged with a scarf tied loosely around her neck, and a butcher knife imbedded in her back; her throat had been slit. An autopsy revealed that Mrs. Krause had been strangled with a cord or rope prior to having her throat slit and that she had sustained several stab wounds to her neck after her throat had been slit.

Mr. Krause told police that he had been attacked by two Caucasian men after he opened his garage door and as he was getting into his car to go to work. The men forced him into the house where they beat him and tied him up, murdered Mrs. Krause, and stole a television, gold coins, and jewelry, including a diamond ring and a watch. Mr. Krause reported that after the assailants left

his home, he untied himself and went upstairs in an attempt to aid Mrs. Krause. Physical evidence indicated that at least two perpetrators had been present at the Krause home. The perpetrators left the scene in Mr. Krause's car but abandoned it at the gates of the country club. Mr. Krause suffered a head injury in the attack; he died the following year from unrelated causes.

Several days after the crime had been committed, a confidential informant (later identified as Joey Costanza) contacted Las Vegas Metropolitan Police Department (LVMPD) Detective Mike Whitney. Costanza told Det. Whitney that approximately six weeks before the Krause robbery/murder, Gerald Weakland had approached him about assisting in a robbery/murder to take place in the early morning hours of a Monday or Friday before one of the victims went to work and would involve scaling a wall of some sort. Costanza allegedly knew the exact location of the crime scene (i.e., the Krauses' address). Costanza also mentioned two other individuals who might have been solicited or involved in the crime—Tom Boutwell and Bobby Webb.

Det. Whitney gave this information to several police officers, including Lieutenant Beecher Avants and Detective Chuck Lee, who subsequently questioned Boutwell, Webb, and Weakland. In a February 1974 telephone conversation between Lt. Avants and Costanza, Costanza allegedly stated that he had never heard the names of LaPena or Rosalie Maxwell, LaPena's girlfriend, associated with Weakland or the Krause crimes. Police arrested Weakland for the Krause murder/robbery in March 1974.

During a preliminary hearing, Weakland admitted to the crimes and struck a deal with the State wherein he agreed to testify that Maxwell and LaPena had hired him to murder Mrs. Krause. In exchange for this testimony, Weakland was allowed to plead guilty to second degree murder, with a sentence of five years to life, and all other charges against him (some of which were unrelated to the Krause crimes) were dropped. In his March 29, 1974 confession, Weakland told authorities that while Boutwell, his accomplice, was robbing the Krause home, he slipped upstairs and murdered Mrs. Krause by slitting her throat with a single cut. Weakland maintained that he had not strangled Mrs. Krause or stabbed her in the neck. Weakland maintained that LaPena, an acquaintance to whom he owed money, had approached him at the end of December 1973, and asked him to kill Mrs. Krause. LaPena allegedly explained to Weakland that Mr. Krause was a wealthy slot manager at Caesar's Palace who was dating LaPena's girlfriend, Maxwell, who also worked at Caesar's. LaPena and Maxwell wanted Weakland to kill Mrs. Krause so that Maxwell could marry Mr. Krause and inherit the Krause fortune for the benefit of herself and her boyfriend, LaPena.

Weakland claimed that LaPena had offered to forgive his debts and pay him a large sum of money in exchange for Mrs. Krause's murder. On January 4, 1974, Weakland went to Maxwell's apartment where she and LaPena gave him $1000 as a down payment for the murder, told him that he would receive another $10,000 after Maxwell married Mr. Krause, and explained the "plan" for robbing the Krauses and murdering Mrs. Krause. Maxwell allegedly gave Weakland a map of the Krauses' residence during this meeting. Weakland stated that he asked Webb to help him commit the crime but, ultimately, Boutwell accompanied him. Weakland told police that he had never spoken to or had any contact with Mr. Krause prior to the January 1974 robbery/murder.

Based upon Weakland's statements to the police, on April 23, 1974, LaPena and Maxwell were arrested for the Krause robbery/murder. Both were charged with first degree murder and robbery with the use of a deadly weapon. The criminal complaint alleged that LaPena and Maxwell had entered into a contract with Gerald Weakland "whereby ... Weakland was to kill [Mrs. Krause]."

Weakland testified to LaPena's guilt at LaPena's preliminary hearing; however, at both Maxwell's and LaPena's separate trials, Weakland testified that his prior testimony and statements implicating LaPena and Maxwell in the murder were false. *LaPena v. State*, 98 Nev. 135, 136, 643 P.2d 244, 244

(1982). Maxwell was acquitted at trial, but LaPena was convicted by a jury of one count of first degree murder and one count of robbery with the use of a deadly weapon.

On direct appeal, this court reversed LaPena's conviction and remanded for a new trial on the ground that admission of Weakland's statements incriminating LaPena constituted reversible error. This court concluded that the State had improperly withheld "the benefits of a plea bargain or promise of leniency until after a purported accomplice [(i.e., Weakland)] had testified in a particular manner." *Id.* at 136–37, 643 P.2d at 244–45. Weakland was eventually charged with two counts of perjury, to which he entered an *Alford* plea and received probation. Gary Gowen, Esq., assumed LaPena's representation.

On September 29, 1982, Weakland testified against LaPena before a grand jury, reiterating his initial statements to police and testimony at LaPena's preliminary hearing implicating LaPena and Maxwell. Weakland told the grand jury that he had since reached a new agreement with the State wherein "the prosecution team would cease writing negative letters to the State parole board" about Weakland. The grand jury returned an indictment against LaPena.

In anticipation of retrial, LaPena filed a motion for disclosure of the identity of confidential informant Costanza. After the district court denied his motion, LaPena filed a petition for a writ of mandamus, which this court granted. *LaPena v. District Court*, Docket No. 14640 (Order Granting Petition for Writ of Mandamus, August 31, 1983).

After this court ordered Costanza's name divulged, Det. Lee traveled to New Jersey to meet with Costanza and to encourage Costanza to return to Nevada. Costanza refused to travel to Nevada and called Lt. Avants after meeting with Det. Lee. Costanza told Lt. Avants that he had no additional information to provide with regard to the Krause robbery/murder. Upon receipt of Costanza's name and New Jersey address, Gowen sent Costanza a letter; Costanza subsequently telephoned Gowen and told him that he had no additional information beyond that which he had already given to Det. Whitney shortly after the Krause robbery/murder.[1]

Gowen then tried to compel Costanza's attendance through the use of the Interstate Compact and eventually enlisted the help of the LVMPD in filing a material witness warrant. According to Gowen, the district attorney's office refused to help. Prosecutor Melvyn Harmon maintained that he advised Gowen as to how to compel Costanza's attendance, but Gowen chose to take an ineffective "short cut."

Costanza contacted the police as well as the district attorney on several occasions to impress upon them that he knew nothing more than the information he had previously provided in his police report. Nonetheless, in 1984 LaPena was still seeking Costanza's attendance in Nevada and filed a motion to depose Costanza. This court reversed the district court's denial of LaPena's motion. *LaPena v. Moran*, Docket No. 16196, 101 Nev. 957, 808 P.2d 578 (Order, October 22, 1985).

On January 15, 1985, Costanza was arrested in Florida. Det. Lee and an individual from the Clark County district attorney's office were dispatched to Florida in an attempt to secure Costanza's testimony in Nevada.[2] Defense investigator Michael Wysocki flew to Florida the following day. However, Costanza was released from custody at the conclusion of a Florida hearing to compel his attendance in Nevada "because proper documents had not been provided."

LaPena subsequently filed a motion with the district court for an evidentiary hearing to determine if the State had complied with certain discovery requests including those seeking further information with regard to Costanza. The district court denied the motion, but this court issued an order that an evidentiary hearing be conducted concerning

1. Gowen would later maintain that unbeknownst to LaPena or LaPena's successor counsel, Gowen received additional information from Costanza during this 1983 phone conversation.

2. Gowen claimed that he never saw the State's inter-office memorandum memorializing the Florida meeting between Costanza and Det. Lee.

whether the State had disclosed all of its information regarding Costanza. *Lapena v. District Court*, Docket No. 18963, 104 Nev. 862, 809 P.2d 609 (Order Granting Petition for Writ of Mandamus, August 26, 1988).

The district court subsequently conducted an evidentiary hearing on October 26–27, 1988. At the beginning of this evidentiary hearing, Gowen learned that he had been relieved as LaPena's counsel. George Carter, Esq., and Lamond Mills, Esq., were appointed to represent LaPena through his second trial. Following the evidentiary hearing, the district court concluded that the State had provided all of the information in its possession regarding Costanza and denied LaPena's motion seeking further funds "for the Costanza matter."

Although Gowen had been removed from LaPena's case, he continued to work on the matter and helped Mills file a pretrial motion to dismiss the indictment on behalf of LaPena. LaPena's second jury trial commenced in May 1989, and he was again convicted of first degree murder and robbery with the use of a deadly weapon. LaPena did not testify on his own behalf. The trial court sentenced LaPena to life imprisonment without the possibility of parole for the murder of Mrs. Krause, and a concurrent thirty-year sentence for the robbery of the Krause home with the use of a deadly weapon. This court affirmed LaPena's conviction and sentence. *LaPena v. State*, Docket No. 20436, 107 Nev. 1126, 838 P.2d 947 (Order Dismissing Appeal, June 27, 1991). Gowen assisted LaPena's appellate counsel, Carmine Colucci, and argued the case before this court.

On June 3, 1992, LaPena filed the PCR petition at issue. The district court denied LaPena's PCR petition without conducting an evidentiary hearing. On appeal, this court remanded the matter for an evidentiary hearing. *Lapena v. State*, Docket No. 23839, 109 Nev. 1404, 875 P.2d 1066 (Order of Remand, November 24, 1993). On December 3, 1993, LaPena filed a motion to dismiss the indictment based upon an alleged lack of evidence and "a colorable claim of factual innocence." LaPena's motion to dismiss was subsequently consolidated with the PCR petition, and LaPena presented evidence in support of dismissal at the evidentiary hearing.

The district court conducted the evidentiary hearing October 16–20, 1995. The district court then granted LaPena's PCR petition and vacated his conviction and sentence on the ground that LaPena had not received effective assistance of trial counsel. The district court denied LaPena's motion to dismiss and ordered the matter reset for a new trial. The State appeals from the grant of LaPena's PCR petition, and LaPena cross-appeals from the denial of his motion to dismiss the indictment.

DISCUSSION

The district court erred in granting respondent's petition for post-conviction relief on the basis of ineffective assistance of counsel.

[1–5] "The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review." *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish prejudice, the defendant must show that but for counsel's mistakes, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 694, 104 S.Ct. 2052. Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy. *Id.* at 689, 104 S.Ct. 2052.

Counsel were not ineffective in their impeachment of Weakland at LaPena's second trial.

[6] Following the evidentiary hearing below, the district court found that: "On September 29, 1982 Weakland testified before the Clark County Grand Jury and again implicated LaPENA, however, before he testi-

fied the State entered into a written agreement with Weakland not to interfere with his efforts to obtain parole." The district court further found that Mills was aware that Weakland had negotiated with the State for his testimony against LaPena. The district court noted the importance of Weakland's testimony and found that the failure to use this information to impeach Weakland at trial had greater impact than it would have had for a less important witness.

We do not contradict the finding that Weakland was not impeached at trial using the specific 1982 agreement wherein law enforcement agreed to stop "sabotaging Mr. Weakland's efforts to get paroled" in exchange for Weakland's testimony before the grand jury and at trial. Rather, we find that Weakland's credibility was, nonetheless, substantially impeached at trial, such that LaPena's counsel rendered "reasonably effective assistance" pursuant to *Strickland*.

Mills cross-examined Weakland at trial and elicited the fact that in 1974 Weakland had pleaded guilty to second degree murder for the Krause robbery/murder and other unrelated charges were dropped by the State in exchange for his testimony against LaPena. Weakland admitted that he had recanted his story implicating LaPena in the first trial, been convicted of perjury, and had now switched back to his original story against LaPena. Furthermore, at trial, counsel presented the testimony of psychologist William Mason Knapp, Ph.D., who had extensively evaluated Weakland and found him to be a psychopathic liar.[3]

LaPena argues that the defense counsel should have obtained expert advice concerning inconsistencies between Weakland's testimony regarding the murder and the autopsy report. However, the discrepancies were obvious enough that, applying the highly deferential standard of *Strickland*, we cannot say counsel was deficient in this regard. Counsel extensively cross-examined Weakland on inconsistencies between Weakland's testimony as to what he did to Mrs. Krause and the findings of the coroner.[4]

With regard to impeachment of Weakland based on events in his recent past, we conclude that counsel was by no means deficient. During the evidentiary hearing, Weakland testified that in 1985, while in prison for the murder of Mrs. Krause, he had hit a civilian. Following a trial, he was convicted of battery and sentenced to one year in prison. Habitual criminal charges were filed but, according to Weakland, the judge "flat refused to consider" those charges. Weakland was paroled in 1988.

Weakland also testified at the evidentiary hearing that following his 1988 release, there had been four attempts to revoke his parole. One 1990 incident involved driving with an open container; Weakland was incarcerated for thirty-five days and re-released on parole. Some time after 1988, Weakland entered a plea to being an ex-felon in possession of a firearm and received a one-year sentence from the court and a one-year violation from the parole board. Then, in 1994, Weakland was imprisoned pending trial for battery and robbery charges arising out of a fight at Baldini's Casino; he was acquitted following a 1995 trial and immediately released. Finally, in the summer of 1995, Weakland's parole was revoked based on alcohol consumption, and he was placed on house arrest for six months. Weakland also stated that at the time he testified against LaPena in 1989, he was drinking and gambling.[5]

At trial, counsel accused Weakland of murdering a fellow inmate and assaulting another individual. The trial court deemed this evidence inadmissible as Weakland had not been convicted of either crime and the crimes did not involve dishonesty. Additionally, counsel tried to introduce evidence that prior

3. The fact that on cross-examination Dr. Knapp also gave an unfavorable opinion as to the credibility of two defense witnesses does not negate the impeachment value of Dr. Knapp's testimony as to Weakland's veracity.

4. With regard to the fact that the autopsy report failed to mention the knife found in Mrs. Krause's back, Mills stated that he did not see the need of retaining an expert to impeach the coroner on such an obvious discrepancy.

5. Weakland's wife also testified at the evidentiary hearing that Weakland had begun drinking and gambling excessively following his 1988 parole, contemplated suicide, and written bad checks.

to Mrs. Krause's murder, Weakland had worked for Costanza, who Weakland testified was a loan shark, as "the muscle" or a "body guard." The trial court held that this line of questioning was also inadmissible.

At the 1989 trial, when asked about his ıged story once again implicating LaPe- Weakland testified that since being re- ed from prison in 1988, he had undergone t LaPena describes as "a moral transfor- ion." [6] LaPena contends that this testi- ıy "opened the door" for his counsel who ıld have impeached Weakland with his avior after release, including Weakland's king and gambling. LaPena further as- s that although during cross-examination he 1989 trial Mills brought out the fact Weakland had recently been convicted ıitting a civilian, counsel failed to ask questions that would have shown the jury that Weakland received extremely lenient treatment in this and other matters as anoth- er benefit for his testimony against LaPena in the 1989 trial.

We conclude that even though certain evidence was held inadmissible, defense counsel made substantial efforts to impeach Weakland with bad acts, his prior perjury convictions, and numerous inconsistencies between Weakland's testimony and the physical evidence. LaPena bears the burden of "showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment" and "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. We conclude that LaPena has failed to meet this burden. Applying an "objective standard of reasonableness," we conclude that counsel were not deficient in their impeachment of Weakland.

LaPena's failure to testify was not the result of ineffective counsel.

[7] The district court found that counsel failed to adequately prepare for trial and investigate possible corroborating witnesses and that these failures resulted in LaPena's decision not to testify at his 1989 trial. The parties concede that LaPena was aware of his right to testify at his second trial and voluntarily waived that right. The parties also concede that LaPena's testimony went poorly at his first trial. We conclude that LaPena made an informed, strategic choice not to testify in the second trial.

At the evidentiary hearing Mills and Carter consistently testified that LaPena decided not to testify so as to avoid the "expected rigorous and thorough cross-examination." Mills explained that LaPena had been extremely involved in all decisions made regarding his defense, and further noted: "I should advise you though I have never had a client who wanted to testify who did not testify." Mills testified that LaPena had stated that he did not want to be cross-examined by Harmon. Also, during the same general time frame as the Krause robbery/murder, LaPena was the defendant in another case wherein he had been accused of hiring Weakland and Webb to enforce a contract on an individual by the name of Obenauer. LaPena's conviction in the Obenauer case was reversed, but he was still afraid that this incident might surface if he testified in the Krause case.

[8] LaPena admits to these discussions with counsel, but maintains that the only reason he decided not to testify was because counsel would not call other witnesses to corroborate his proposed testimony. LaPena does not elaborate on what this testimony might be. The State points out that in the first trial, numerous prosecution witnesses contradicted LaPena's testimony as to where and when he had first met Weakland, that LaPena was a respectable businessman, that Weakland had not been to Maxwell's house to meet with Maxwell and LaPena shortly before the Krause robbery/murder, that Weakland had not given him gloves worn by Weakland during the murder, and that he had never met with Webb.

6. Weakland stated: "You know, I lost my values in life there a few years back. My family stuck through with me .... And they have constantly stuck by me. And I owe that to them, and I want to do what's right."

Left out a great deal of more transparent testimony against LaPena's character

LaPena asserts that the witnesses who were called by counsel in his second trial failed to corroborate his potential testimony and in no "way presented a theory of defense." However, several inmates testified for the defense as to statements made by Weakland while in jail, prior to LaPena's first trial, which indicated that Weakland had falsely implicated LaPena in the Krause robbery/murder. Charles Cooper had testified that in 1974, fellow-inmate Weakland had told him that he had falsely implicated LaPena in the Krause robbery/murder to avoid the death penalty. Eddie Eckert was a prison friend of Weakland and testified that Weakland "hate[ed LaPena's] guts" and had told Eckert that he had to think of someone to blame for the crime or Weakland's wife would be blamed. Eckert also claimed that he had spoken with LaPena while they were both incarcerated and LaPena had denied being involved in the Krause robbery/murder. Another inmate, Bernard Ybarra, testified that Weakland had stated LaPena "didn't know anything about" the Krause robbery/murder, and that Mr. Krause "did it."

An acquaintance of the Krauses testified that she had never seen Mr. Krause's alleged mistress, Maxwell, at the Krause home before the murder. Also, an LVMPD transport officer testified that he had never had any problems with LaPena, and a woman testified that Maxwell had been working on the night Weakland allegedly met with LaPena and Maxwell at Maxwell's townhouse, prior to the Krause robbery/murder.

At the evidentiary hearing, LaPena testified that the following witnesses should have been called by counsel at his 1989 trial: (1) Melinda Swerigan to testify that on the day Weakland alleged he had come to the Hacienda Hotel to get a payoff from LaPena for the Krause crimes, Weakland was actually applying for a job; (2) Otis McClindon and Tills Bank, who had testified at LaPena's 1974 preliminary hearing, to testify that certain monies paid by LaPena to Weakland's ex-wife were a loan and not a payoff for Mrs. Krause's murder; (3) Camille Dixon, Brian Clayton, Richard Grisham, and other neighbors to testify that LaPena did not have a meeting with Webb in November 1973; (4) Geneva Blue to testify that Maxwell had contracted for the murder of Mrs. Krause and that LaPena was completely innocent; (5) "Nurse Haley" to testify as to jewelry Mr. Krause was wearing when he was brought to the emergency room on the day of the robbery/murder; and (6) Maxwell to rebut the State's theory of LaPena's motive, to impeach Weakland, and to corroborate LaPena's proposed testimony.

According to Gowen, Maxwell's testimony would have shown that she always worked Fridays and thus could not have given Weakland the money to kill Mrs. Krause on a Friday night. However, this evidence would not be helpful given the fact that Weakland thought he received the money on January 2, 1974—a Wednesday—which is corroborated by evidence of a January 3, 1974 deposit slip for Weakland's account. Gowen also said Maxwell could contradict the fact that she took the money she gave to Weakland out of a Bible, because she would testify that she is agnostic. However, as the district court pointed out there is no evidence that Weakland ever made this statement regarding the Bible.

Moreover, Maxwell refused to testify in LaPena's first trial, even after being held in contempt for trying to assert her Fifth Amendment rights after she had been acquitted. LaPena himself testified at the evidentiary hearing that when the State contacted Maxwell to give testimony in the 1989 trial she was reluctant. At the evidentiary hearing the district court judge asked her if LaPena was innocent, and she stated, "I don't—no. Well—excuse me . . . I don't believe he's guilty because I was arrested as a conspirator and I was not guilty so how could he be?" She further stated that she knew the time, location, and lawyers involved in LaPena's 1989 trial, but she did not contact anyone to inform them of the alleged exculpatory value of her testimony.

Carter testified at the evidentiary hearing that certain witnesses "weren't as important perhaps as Mr. LaPena might think they were." Mills stated that they (he, Carter, and LaPena) agreed that Maxwell should not testify because in some areas "she was quite

vulnerable and could in effect bring out information that we did not want to go before the jury." Mills further testified:

> I do not know of any witness in which [LaPena] wanted to call that we did not call. And I know with Rosalie Maxwell because I remember that particular meeting, that it was a joint agreement that we would not call her, that she had too much baggage.
>
> ....
>
> I don't recall of having any of those kind of conflicts over a witness.... [M]y philosophy is when it comes down to a situation that my client wants to call a witness I call the witness, unless I know the witness is going to submit perjury or something of that nature, the witness is going to be called.

We conclude that similar to LaPena's decision not to testify, certain witnesses were not called based upon strategic reasoning which was made after reasonable investigation. Therefore, these decisions are "virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.[7]

LaPena has not shown prejudice by virtue of counsel's failure to procure Costanza's testimony.

[9] The district court found that LaPena's counsel could have arranged for Costanza's appearance and that the failure to have Costanza testify at trial was prejudicial to LaPena's defense. The district court further found that the 1983 conversation Gowen reportedly had with Costanza provided impeachment information that could have been used against Weakland and went beyond the contents of the confidential informant reports that were admitted at trial.

We conclude that all the information provided by Costanza was presented at both of LaPena's trials. Harmon, the lead prosecutor in both LaPena trials, testified at the evidentiary hearing that the primary reason for the seven-year delay between LaPena's second indictment in 1982 and his second trial in 1989 was Gowen's alleged inability to get Costanza to Nevada. Harmon stated that he had repeatedly told Gowen to use the Uniform Act to Compel the Attendance of Witnesses, codified in NRS Chapter 174, but Gowen failed to do so. The State asserts that Gowen deliberately ignored available means of gaining Costanza's attendance as "a strategic delay tactic." We agree.

Harmon further testified that Det. Whitney's report detailing his initial contacts with Costanza in 1974 was presented at both trials, and Costanza repeatedly told the police that he had no other information than that which he had initially provided. Moreover, at the evidentiary hearing, Harmon testified that every trial judge connected with this case had been "most generous in relaxing the rules of hearsay so that every scrap of material that was available regarding the confidential informant ... could come before the trial jurors."

Assuming LaPena's counsel was deficient in failing to procure Costanza's testimony, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. LaPena alleges that Costanza's testimony would contradict Weakland's and therefore is crucial to his defense; however, all of Costanza's information was generously admitted at trial through reports and testimony of others involved. Furthermore, Costanza wrote a letter to Harmon and stated on several other occasions that he had told the police all that he knew years ago.

7. LaPena quotes *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir.1990) for the proposition that: "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." We are not constructing defenses; rather, we conclude that LaPena has failed to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). We note that *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991), is entirely distinguishable from the instant case in that with the exception of Sanborn's own testimony, counsel failed to present any defense whatsoever to the jury.

The fact that as of the 1995 evidentiary hearing LaPena had still not obtained an affidavit from Costanza specifying what additional exculpatory evidence he could provide undermines LaPena's assertion that this testimony was critical to the 1989 trial's outcome. We conclude that all evidence with regard to Costanza was properly presented in LaPena's trials and, therefore, LaPena cannot show that Costanza's presence would have likely produced a different result.

LaPena has not shown prejudice by counsel's failure to obtain information in Gowen's possession regarding Costanza.

[10] The district court found that Gowen's intentional failure to document his 1983 conversation with Costanza and provide such information to successor counsel was prejudicial to LaPena's defense, and successor counsel should have affirmatively pursued such information. The district court found that this combined failure of communication and effort was prejudicial to LaPena.

The parties agree that there was substantial communication between Gowen and successor counsel—Carter and Mills. Carter testified at the evidentiary hearing that he "got pretty much everything" from Gowen prior to LaPena's 1989 trial. Likewise, Gowen testified that he had turned everything over—all his files, his opinion, his strategy, *everything* on the case—to Mills and Carter. Furthermore, Gowen remained involved in LaPena's case through the second direct appeal.

According to LaPena, he did not discover that Gowen had received valuable information from Costanza until the 1995 evidentiary hearing. During the evidentiary hearing, Gowen stated that he had not given LaPena any details about his 1983 conversation with Costanza until *after* LaPena's 1989 conviction. Gowen testified that there was information he never wrote down pertaining to LaPena's case because he was paranoid about someone breaking into his office; however, he does not specify the nature of this information. Because LaPena has failed to present any evidence that the substance of Costanza's 1983 conversation with Gowen would provide any additional information not previously presented to the jury, he has failed to show prejudice by any of counsel's alleged deficiencies.

Counsel was not ineffective in failing to discover the alleged connection between Weakland and Mr. Krause.

[11] The district court found that proper investigation would have revealed a connection between Mr. Krause and Weakland and would have consequently impeached Weakland's claim that he did not know Mr. Krause. The district court found that this fact was crucial to LaPena's defense as it would have provided both motive and opportunity for Weakland to have committed the crime without LaPena.

At the 1995 evidentiary hearing, LaPena's current counsel asked Weakland if he had ever met Mr. Krause prior to the 1974 robbery/murder; Weakland reiterated his contention from both trials that he had not. Ted Martinez then testified that he and Weakland had worked together as waiters at a Las Vegas restaurant. LaPena asserts that it was only through Martinez' 1995 testimony that "LaPena was able to conclusively establish that Weakland had lied throughout the course of the various proceedings and was continuing in his lies about his involvement with Marvin Krause."

Martinez testified that the Krauses were regulars at the restaurant, but he could not say he knew of Weakland socializing with the Krauses or even that Weakland knew the Krauses personally. Moreover, Martinez did not remember more than two instances where Weakland waited on the Krauses during his three-year employment at the restaurant.

LaPena theorizes that Mr. Krause killed Mrs. Krause after Weakland left the Krause residence on the morning of January 14, 1974. LaPena relies on the fact that Weakland has consistently stated that he killed Mrs. Krause by slitting her throat; although the autopsy showed multiple stab wounds in Mrs. Krause's neck and strangulation as the cause of death, Weakland maintains that he never stabbed or strangled her. Weakland testified that he did not check to see if Mrs.

Krause was alive when he left the scene. LaPena asserts that all of this "exculpatory information" combined with Martinez' testimony at the evidentiary hearing demonstrates his factual innocence and his trial counsel's failure to properly investigate his case. We disagree.

Mills testified that efforts were made to uncover a connection between Weakland and Mr. Krause, and even if counsel had created a stronger connection between Weakland and Mr. Krause, there was overwhelming evidence that LaPena hired Weakland to commit the murder. Weakland never named anyone other than LaPena as the person who hired him to kill Mrs. Krause. Also, Webb testified at the 1989 trial that Weakland had told him that LaPena and Maxwell had hired him to kill Mrs. Krause. Weakland's accomplice, Boutwell, also testified that LaPena had orchestrated the plan to kill Mrs. Krause. An inmate who had shared a cell with LaPena testified at the second trial that LaPena had admitted his involvement in Mrs. Krause's murder. Det. Lee testified that shortly after the murder, LaPena accompanied Maxwell to the police station for questioning, and when officials interviewed LaPena he was quite upset and emotionally fell apart during the interview. One week later LaPena, still extremely nervous, contacted Det. Lee to tell him that the person who killed Mrs. Krause was an individual identified only as "Charlie the knife from Chicago." Telephone records admitted into evidence revealed that one or two days after the murder, Weakland and his wife called LaPena's residence from the Windsow Hotel in Lake Havasu, where they spent a day or two.

From the evidence presented at the evidentiary hearing, we conclude that LaPena has failed to show that counsel was deficient in pursuing the alleged Krause–Weakland connection; even if counsel was deficient, LaPena failed to show prejudice under *Strickland*. Having concluded that LaPena was properly convicted at his 1989 trial, we affirm the district court's denial of LaPena's motion to dismiss the charges against him.

CONCLUSION

Having reviewed all of LaPena's assertions of ineffective counsel, we conclude that the district court erroneously granted LaPena's PCR petition. The district court properly denied LaPena's motion to dismiss all charges against him.[8]

YOUNG, SHEARING, JJ. and ZENOFF, Sr.J., concur.

SPRINGER, C.J., dissenting:

I would affirm the district court's judgment.

The murder was committed in January of *1974*. LaPena was convicted in 1977, almost twenty-two years ago. As stated in the majority opinion, the murder was actually committed by a man named Weakland, who "struck a deal with the State wherein he agreed to testify that ... LaPena had hired him" to commit the murder.

LaPena's conviction was reversed because the State improperly concealed information about a leniency deal that it had offered Weakland, who, to say the least, is a notorious perjurer and murderer, well known to this court and to prosecuting officials.

LaPena's 1977 conviction, in addition to being grounded on the testimony of a perjurer, is subject to so many questions and weaknesses that it would be burdensome to recount them in this dissenting opinion. If this were a relatively clear case, involving a murderer who had killed someone twenty-five years ago, I might look differently at what effect such a long delay has in judging whether it would be just and proper to go ahead now with such a prosecution. The present case is certainly not a clear or straightforward case. A reading of the majority opinion should convince most readers that the district court was right in dismissing this case and not permitting it to go on for a number of additional, agonizing years.

8. The Honorable Charles E. Springer, Chief Justice, appointed the Honorable David Zenoff, Senior Justice, to sit in the place of the Honorable A. William Maupin, Justice. Nev. Const. art. 6 § 19; SCR 10.

WEAKLAND apparently went to NICOL'S LIL ITALY, as his vehicle was found there approximately twenty minutes later by the O/R.

At this time the O/R contacted [redacted] to advise him of what had just occurred, and [redacted] advised that he already knew, that he was told by WEAKLAND that he had observed a plain clothes car in the neighborhood, and felt that something was wrong. However, [redacted] states that he thought he was able to convince WEAKLAND that the neighborhood in which he lived was just a hot neighborhood, and that he should not be concerned over seeing a plain clothes car in the area.

[redacted] advised that he will continue in his attempts to identify the three suspects involved in this homicide, and locate their residences and vehicles.

[redacted] warns however, if any contact is made with subject WEAKLAND by any law enforcement agency at this time in the investigation, he is convinced that WEAKLAND will know where the information is coming from, and he will be unable to be of any further assistance.

Complete copies of information contained in all ID and DR folders, have been ordered from Records, to be attached to this report.

MICHELE WHITNEY, SERGEANT
INTELLIGENCE BUREAU

MW:ef

Reporting DETECTIVE Division of Occurrence DETECTIVE

Time Occurred 1/14/74 4:30 AM Location of Occurrence 2995 Pinehurst
Las Vegas, Nevada

S:

VICTIM: HILDA STOUT KRAUSE

ROBBERY VICTIM: MARVIN KRAUSE

POSSIBLE SUSPECTS:

1. JERRY WEAKLAND
L.V.M.P.D. ID# 144537
Village Green Apartments #476
Las Vegas, Nevada
Currently un-employed, previously employed as assistant pool attendant at Caesars Palace.
VEHICLE: 1973 Chevrolet Monte Carlo, 2 door Hardtop, brn/yel bearing Nevada License CK3254.

2. ROBERT C. WEBB
3712 Garden Drive
Las Vegas, Nevada

3. IRA PORTER III
3712 Garden Drive
Las Vegas, Nevada

4. THOMAS M. BOUTWELL
1205 Yukon 107
Denver, Colorado

5. ROSALIE MAXWELL
136 Greenbriar
Townhouse Way
Las Vegas, Nevada
Phone: 457-2754
Employed as a cocktail waitress swing shift, Calleria Bar, Caesars Palace Hotel.

6. FRANK LaPINA
1420 Greenbriar
Las Vegas, Nevada

Time of This Report 2/8/74 12:45 PM Officer O. R. LYONS Serial P59

Officer C. LEE Serial P486

SIGNATURE

VEHICLE: 1964 Corvette
Employed day shift Bell Captain
Hacienda Hotel.

7. BILL UNDERWOOD
4715 Koval Lane #19
Las Vegas, Nevada
Employed as Pool Manager
Caesars Palace.

DETAILS:

On Saturday, January 19, 1974 at approximately 1300 hours, Detective C. LEE was informed by Lt. AVANTS that possible informa had been developed pursuant to this investigation, and that a meeting had been arranged at 1800 hours that date to discuss this information with members of the Las Vegas Metropolitan Police Department Intelligence Detail at their headquarters.

At 1800 hours, January 19, 1974, Lt. AVANTS, Sgt. ANDERSON and Detective LEE met with members of the Intelligence Detail; at which time the following information was discussed: Police informant related that he had been approached approximately six weeks prior to that date by a subject known to him as JERRY RONALD WEAKLAND, White Male Adult, described as 6', approximately 200 pounds, brown hair and eyes. The informant was asked by WEAKLAND if he wanted to help him on a job. The informant was advised that they would have to climb a wall, and that job would have to be done in the morning at approximately 4:30 AM. as these mornings were the only times when MARVIN KRAUSE left for work at that hour. The informant further related that he had observed two subjects that could possibly have been involved in the case with WEAKLAND. The first subject described name as TOM, white male adult, 6'2, 240 pounds, blond hair (short) and alleged to be a former football player, the other subject was described as having long black hair, bushy black beard, and also being very large in size. A Record check of JERRY RONALD WEAKLAND revealed that his L.V.M.P.D. ID# is 144537, WMA, DOB: 5/25/47, born in Mount Union Pennsylvania, physical description 6', 160 lbs., brown hair and eyes, SS# 585-12-3761. FBI 998 421F, CII 2 294 010. Subject was involved in two incidences 1973 in the Las Vegas area.

In October 1973 WEAKLAND was the suspect in an Assault, this report on file under DR# 73-29711. On 12/7/73 WEAKLAND was listed as a Battery suspect and this report is on file under DR 73-36567.

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK RALPH LAPENA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 23839

FILED

NOV 24 1993

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY

ORDER OF REMAND

This is a proper person appeal from an order of the district court denying appellant's petition for post-conviction relief.

On July 14, 1989, the district court convicted appellant, pursuant to a jury verdict, of one count of murder in the first degree and one count of robbery with use of a deadly weapon. The district court sentenced appellant to serve in the Nevada State Prison a term of life without the possibility of parole for murder, with concurrent terms of fifteen years for robbery and fifteen years for the use of a deadly weapon. This court dismissed appellant's direct appeal. LaPena v. State, Docket No. 20436 (Order Dismissing Appeal, June 27, 1991).

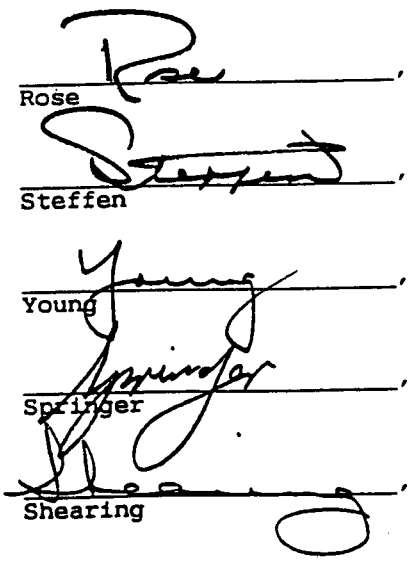
On June 3, 1992, appellant filed in the district court a petition for post-conviction relief. The state opposed the petition. On August 31, 1992, without appointing counsel or conducting an evidentiary hearing, the district court denied appellant's petition for post-conviction relief. This appeal followed.

In his petition for post-conviction relief, appellant claimed the following: (1) Gerald Weakland had a secret agreement with state law enforcement officials; (2) Weakland committed perjury when he gave moral transformation testimony; (3) confidential informant Costanza had information connecting Weakland and Marvin Krause to the murder of Hilda Krause; (4) the state illegally suppressed vital evidence which connected Marvin Krause with the murder; (5) Costanza had a secret

agreement with state law enforcement officials; (6) state law enforcement officials committed perjury when they stated that they did not conceal evidence relating to Costanza; (7) appellant was denied his right to effective assistance of counsel; and (8) the reasonable doubt instruction which was given during the trial was constitutionally defective.

When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Having reviewed the record on appeal, we conclude that appellant's petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle appellant to relief. Accordingly, we vacate the order of the district court denying appellant's petition for post-conviction relief, and we remand this matter to the district court with instructions that the district court conduct an evidentiary hearing.[1]

It is so ORDERED.



Rose, C.J.

Steffen, J.

Young, J.

Springer, J.

Shearing, J.

[1]Although appellant has not been granted permission to file documents in this matter in proper person, see NRAP 46(b), we have received and considered appellant's proper person documents. We deny as moot appellant's motion to be released on personal recognizance pending appeal. We deny appellant's motion to file briefs and motion to amend the record on appeal.

cc: Hon. Thomas A. Foley, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex Bell, District Attorney
Frank R. LaPena
Loretta Bowman, Clerk

GG: Another point that I brought up and was rather incredible to me and was indicative of the prosecutor's attitude toward a fair trial was the fact that there are state officers, officers of their own staff, and prior to that time were investigative officers in this case, absolutely and flatly refused to discuss their knowledge with me, defendant's attorney, prior to any hearing. In fact, one of the officers stated that I could only examine him after he has taken oath and is standing in the jury box. Now that's one heck of time to determine whatever knowledge he may have. I'm told and it has been responded to that we have had access to all of the records of the prior trials and hearings and we certainly know everything that is in the minds of these witnesses. That's not so. There are certain elements in this case and I've made virtually a two and one-half year career, a law career, of this case. There are certain elements in tnis case that are absolutely fantastic to me as an investigator and as a lawyer. One is that that earlier point that I made: why the big gap between January the 16th to February the 8th with nothing in it at all, no information whatsoever, in terms of discovery indicative of how LaPena and Maxwell and other names got on to the suspect list of the police report? What happened at that period of time? There has been no one in prior investigations or prior trials that delved into that particular aspect of the case. There has got to be either, the answer has got to be in

EXHIBIT " "

one or two options, one or two [illegible] is another, indeed a secret informant or confidential informant who has filled in these informative stages or a third possibility is that Weakland talked to them long before he gave up, or a third possibility, the more succinct possibility is that there was a third person at the scene of the crime.

JG: Well, you know counsel, you get into a matter that has been a matter of concern to me for a number of years and I think that this may be a time for me to place it on the record. I don't believe it is a matter that disqualifies me, but it certainly puts me in a position where I, you know, I do have knowledge of a matter that's disturbed me and you are addressing that exact point. A number of years ago a person who was on the District Attorney's staff at the time was talking to me in Carson City about this matter. He is now a District Judge. So I say that he was up there, for some purpose I forget what, but we were talking about this case, and he indicated to me that Mr. LaPena was not the first individual nor even only the second individual that Mr. Weakland incriminated. That, in fact, as I recall the story, Mr. Weakland was first induced in the course of the investigation to incriminate Mr. Kraus and claims that, you know, was trying to bargain for his freedom by incriminating Mr. Kraus, and evidently that was discussed as a possibility to purchase Mr. Weakland's testimony in exchange, you know, by agreeing to give him a lesser sentence in exchange for testimony against Mr. Kraus and ultimately that was decided

...just following ... office and the police department and then Mr. Weakland was induced to say or offered to say that another individual, not Mr. LaPena, had engaged him to kill Mrs. Kraus. And again, this was discussed and finally decided that they wouldn't bargain for Mr. Weakland's testimony on that basis and so finally Mr. Weakland agreed to tell the story that he ultimately told which frankly has some extremely interesting nuances to it, namely, that the motivation was that Mr. LaPena wanted Mrs. Kraus dead so that his girlfriend, Rosalie, could marry Mr. Kraus and funnel his wealth to Mr. LaPena. Now that story, that house that Jack built theory of how Mr. LaPena would profit from this killing, has always seemed to me a little bit incredible, but if I am advised correctly, in any case, Mr. LaPena was the third person that Mr. Weakland was willing to incriminate under entirely different stories in exchange for favorable treatment.

GG: Your Honor, I had not heard that story, but I do know this: in 24 years of practice, and being a former prosecutor myself and have been in defense practice many, many times, I have never, ever ran against a case whereby the fighting, in fighting in the case has no apparent motive and it has spilled over into street fighting, and that is what this case is all about. It's not a straight up and down attempt to seek justice. There is so much more to this case I don't know about that I feel I have just scratched the iceberg, and if I've got to spend another two and one-half years in determining, to get to the botom of it, I'm willing.

APP. 253

FFCL
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Attorney for LaPENA

FILED

OCT 10 1 51 PM '95

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

FRANK LaPENA,

Defendant.

CASE NO. C 59791
DEPARTMENT NO. I
DOCKET J

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE: N/A
TIME: N/A

This matter having come on for hearing before the Honorable Gene Porter, District Court Judge, from October 16, 1995 through October 20,1995, the Defendant being present, represented by David M. Schieck, Esq. and William L. Wolfbrandt, Esq., and the State of Nevada by Stewart Bell, District Attorney, through Mel Harmon, Chief Deputy District Attorney and David Schwartz, Chief Deputy District Attorney. The Court having considered the testimony, the pleadings ad papers and considered the Post Hearing Briefs submitted by the respective parties now makes the following Findings of Fact and Conclusions of Law:

. . .

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APP. 254

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FINDINGS OF FACT

1. On January 14, 1974 Hilda Krause was murdered in Las Vegas, Nevada and on April 23, 1974 FRANK LaPENA (hereinafter referred to as LaPENA) was arrested and charged with the crime. Also charged was Rosalie Maxwell (hereinafter referred to as Maxwell).

2. On August 20, 1976 Maxwell was acquitted after a trial by jury.

3. On April 10, 1977 LaPENA was convicted of First Degree Murder and Robbery.

4. On April 13, 1982 LaPENA'S conviction was reversed by the Nevada Supreme Court based on the erroneous admission of previous testimony and statements from Gerald Weakland (LaPena v. State, 98 Nev. 135, 643 P.2d 244 (1982).

5. Gerald Weakland was the crucial State's witness in the prosecution of LaPENA. Weakland, when he first made statements to the authorities, directly indicated that LaPENA and Maxwell had hired him to kill Hilda Krause. Weakland, at the trial of Maxwell and LaPENA, recanted this testimony and was subsequently convicted of perjury.

6. On September 29, 1982 Weakland testified before the Clark County Grand Jury and again implicated LaPENA, however, before he testified the State entered into a written agreement with Weakland not to interfere with his efforts to obtain a parole.

7. After the reversal of his first conviction and prior to the second trial, LaPENA was represented for a period of

time by Gary Gowen and also by William Smith.

8. LaPENA's second trial concluded on May 20, 1989 and LaPENA was again convicted of First Degree Murder. LaPENA was represented at trial by George Carter and LaMond Mills.

9. On the direct appeal from his second conviction LaPENA was represented by Carmine Colucci and Gary Gowen. The conviction was affirmed in an unpublished opinion issued January 27, 1991.

10. On June 3, 1992 LaPENA timely filed a pro per Petition for Post Conviction Relief and Supplemental Points and Authorities were filed on June 23, 1992. The Petition was denied without evidentiary hearing on August 21, 1992.

11. On November 24, 1993, the Nevada Supreme Court remanded the case for an evidentiary hearing on the issues raised in the Post Conviction Petition.

12. An evidentiary hearing was conducted from October 16, 1995 through October 20, 1995 inclusive, wherein both parties called witnesses to testify.

13. Evidence was available to trial counsel to impeach the testimony of Gerald Weakland as he had once again negotiated with the State for his testimony and again changed his testimony to receive a benefit. Trial counsel, Lamond Mills, admitted knowledge of the arrangement with the State and could articulate no strategic reason for not using the impeachment material. Due to the crucial nature of Weakland's testimony this failure had greater impact than it would have had for a lesser important witness.

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14. LaPENA did not testify at his second trial although he had expressed a desire to do so to attorneys Gowen, Mills, and Carter. The failure to have witnesses available to corroborate the testimony of LaPENA resulted in his acquiescence not to testify. Thus the failure of trial counsel to adequately prepare for trial resulted in LaPENA not testifying. The Court finds that LaPENA was a credible, well-spoken witness who would have significantly aided his own defense by testifying.

15. Witnesses were available to testify at trial that would have corroborated LaPENA'S potential testimony, impeached the questionable testimony of Weakland, and have been of exculpatory nature. These witnesses include the following: Melinda Swerigan, Otis McClindon, Tillis Banks, Brian Clayton, Richard Grisham, Camille Dixon, Geneva Blue, Anthony Bruno, Nurse Haley, Mike Wysocki, and Rosalie Maxwell.

16. The failure to properly interview and call the above listed witnesses at trial was prejudicial to LaPENA'S defense. If these witnesses had been called at trial, substantial doubt would have existed as to LaPENA'S guilt of the charged offense and the result of the trial probably would have been different.

17. Investigator Mike Wysocki had contacted and interviewed a number of the witnesses and expected them to be called to testify at trial. Trial counsel did not personally interview any of the listed witnesses with the exception of Rosalie Maxwell and could articulate no reason for the failure to interview the witnesses or call them to testify at trial.

18. With respect to witness Joey Costanza, the Court finds

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that his appearance could have been arranged by the various counsel that represented LaPENA and that the failure to have Costanza testify at trial was prejudicial to LaPENA'S defense. The Uniform Act to Compel Attendance of Witnesses should have been utilized by counsel to assure Costanza's appearance in Nevada for LaPENA'S trial.

19. The Court finds that the conversation that Gowen reportedly had with Costanza provided impeachment information that could have been used against Weakland and went beyond the contents of the confidential informant reports that were admitted at trial.

20. The intentional failure by Gowen to document the contents of his conversation with Costanza and provide same to successor counsel was deficient performance that prejudiced LaPENA'S defense. These derelictions left LaPENA at the mercy of Gowen's memory as to the contents of the conversation with Costanza and hampered not only trial counsel but also the ability of LaPENA to establish his post conviction claims concerning Costanza.

21. Gowen possessed information about LaPENA'S case that should have been provided to successor counsel and which successor counsel should have affirmatively sought out. This combined failure of communication and effort was prejudicial to LaPENA.

22. The Court finds that based on the other findings herein contained that it need not reach the issue of whether counsel should have moved to recuse Judge Foley from the case

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or whether his adjudication of the case was improper or affected LaPENA'S right to a fair trial.

23. The Court finds that LaPENA has failed to establish a Brady violation, to wit that exculpatory evidence was withheld by the prosecutor. Nothing was presented to show that the State had received any information from Costanza that was not known to LaPENA'S counsel, Gowan, who testified that he had personally spoken to Costanza. The Court has already addressed the failure of counsel with respect to the Costanza information that was not presented at trial, and the same information is the basis of the Brady claim.

24. The testimony of Weakland would have been impeached by the testimony of Costanza in a number of respects, including the timing of the involvement of Webb and Boutwell in the scheme, the source of Weakland's knowledge, that Costanza received Krause's watch from Weakland, and that Weakland had told Costanza that LaPENA was involved. Establishing that Weakland had lied under oath concerning these matters would have made the remainder of his trial testimony all the more incredible.

25. Proper investigation and preparation would have revealed the connection between Krause and Weakland. Krause and Weakland worked in close proximity to each other at Caesar's Palace and the Court finds that Weakland's claim that he never knew or met Krause could and should have been impeached at trial. Establishing this connection was crucial to an adequate defense for LaPENA and would have provided both

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motive and opportunity for Weakland to have committed the crime without any involvement from LaPENA.

26. The Court finds that an investigation into Weakland's recent past prior to his trial testimony would have revealed significant information to impeach Weakland at trial. Weakland's activities in prison and while on parole could have established that he could not be believed, and without the jury believing substantial portions of the testimony of Weakland, LaPENA could not have been convicted.

27. The Court finds that Gowan also failed to document and inform successor counsel concerning the results of his investigation into Weakland's prison activities which could have been used for impeachment. Gowan's performance in this regard was deficient. The Court also finds that the same information was available to trial counsel if they had pursued investigation and that their performance was also deficient, both of not getting the information from Gowan and for not independently discovering same. This information was available from witness Mace Knapp, yet he was never interviewed prior to being placed on the witness stand to determine the nature and extent of his knowledge about Weakland.

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CONCLUSIONS OF LAW

1. A criminal defendant is entitled to receive reasonable effective assistance of counsel through trial and upon direct appeal of his conviction. Strickland v. Washington, 460 U.S. 668 (1984). In order to establish a claim of ineffective assistance of counsel the defendant must establish first that

counsel's performance was deficient and second that the deficient performance prejudiced the defense.

2. Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's error, the result of the trial probably would have been different. State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322 (1993).

3. The performance of trial counsel is found to be deficient in failing to utilize known exculpatory witnesses and failure to investigate, develop and present evidence which would have corroborated LaPENA'S proposed testimony and discredited the State's feature witness Gerald Weakland.

4. The failures of counsel were prejudicial to LaPENA'S defense and were so serious as to deprive LaPENA of fair trial, to wit: a trial whose result was reliable, such that, but for counsel's error the result of the trial probably would have been different.

5. Pre-trial investigation and preparation for trial are key to effective representation of counsel. Defense counsel has a duty "to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary." Strickland, 466 U.S. at 691; State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993). The pre-trial investigation and preparation for trial of trial counsel was deficient based on the findings of fact entered above.

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6. New Jersey is a signatory to the Uniform Act to Compel Attendance of Witnesses and said act was available to LaPENA'S counsel to obtain the testimony of Joey Costanza.

7. The Court denies the Motion to Dismiss filed in this matter and consolidated for hearing with the Post Conviction proceedings. The factual guilt or innocence of LaPENA is for a jury to decide. The Court limits its ruling to those findings set forth herein concerning ineffective assistance of counsel.

8. The Motion to Dismiss for failure to provide claimed discovery concerning the second assailant is denied in light of the other findings made by the Court concerning ineffective assistance of counsel. Such matters can be resolved in pre-trial motions before the new trial.

9. To establish a due process violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) the Petitioner must establish (a) suppression by the prosecution after a request by the defense; (b) the favorable character of the evidence for the defense; and (c) the materiality of the evidence. As the Court has found no suppression of evidence by the State, the remaining prongs of the test need not be addressed.

ORDER

Based on the Findings of Fact and Conclusions of Law herein contained, it is hereby

ORDERED, ADJUDGED AND DECREED that LaPENA'S Petition for Post Conviction Relief is granted and his Conviction and

. . .

. . .

David M. Schieck
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Sentence are hereby vacated and the matter is to be reset for a new trial.

DATED AND DONE: OCTOBER 7, 1996

DISTRICT COURT JUDGE

SUBMITTED BY:

DAVID M. SCHIECK, ESQ.

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APP. 263

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant/Cross-Respondent,
vs.
FRANK LAPENA,
Respondent/Cross-Appellant.

No. **29429**

District Court Case No. C59791

REMITTITUR

TO: Honorable Shirley Parraguirre, Clark County Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion.

Receipt for Remittitur.

DATE: October 26, 1999

Janette Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. Gene T. Porter, District Judge
Attorney General
Clark County District Attorney
David M. Schieck

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on _____.

_____
County Clerk

jw

APP. 264

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK LaPENA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 20436

FILED
JUN 27 1991
Clerk of Supreme Court
By
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction of first degree murder and robbery with the use of a deadly weapon.

In order to dispose of the issues on appeal, it is necessary to first review the facts. Frank LaPena was found guilty of initiating the contract murder of Hilda Krause, 71, at her home on January 14, 1974. Marvin Krause, her husband, was at that time the slot manager for Caesar's Palace in Las Vegas. He was knocked senseless. One Gerald Weakland, who had agreed to execute the murder contract, and an associate, escaped with assorted jewelry and a TV set.

Within a few days, a police confidential informant pointed a finger at Gerald Weakland. Eventually a "love" triangle emerged. Marvin Krause was involved with Rosalie Maxwell, a cocktail waitress at Caesar's. Maxwell was also involved with Frank LaPena, whom she described to police as her "true love" while Mr. Krause was her "live one." LaPena, a bell captain at Caesar's, told the police that he knew about the Krause-Maxwell relationship and "he didn't care as long as the money kept coming in."

According to Weakland's testimony, with Hilda Krause out of the way, Rosalie would then be free to marry Marvin Krause. LaPena would be the ultimate financial beneficiary. For his part, Weakland was offered $1,000 in advance and $10,000

in the future; in addition, considerable sums that Weakland, an inveterate gambler, owed LaPena, would be forgiven.

Firstly, although appellant argues that Weakland's plea agreement was such that Weakland testified under an undue compulsion to offer slanted testimony, the record reveals no specific testimony bargained for by the State. See Franklin v. State, 94 Nev. 220, 225, 577 P.2d 860, 862 (1978).

Appellant next contends that the State impermissibly interfered with securing a potential defense witness for trial. See Brady v. Maryland, 373 U.S. 83, 87 (1963). However, it would appear from a careful review of the record, that the witness himself was principally responsible for his non-appearance, wishing to distance himself from the crime.

Next, LaPena claims that the prosecution failed to disclose exculpatory conduct to the grand jury, more specifically, "the concessions and benefits bestowed upon Weakland." In the grand jury proceeding, the prosecutor presented all the salient exculpatory evidence relevant to the issues at trial. The grand jury was indisputedly told that Weakland was serving a life sentence for murder, that he had pled to second degree murder in return for his testimony in the first LaPena trial, and that the State's new agreement in the second LaPena trial was an offer to cease writing negative letters in Weakland's regard to the State's Parole Board. Weakland informed the grand jury of the most devastating information about his credibility: convictions for two counts of perjury in connection with an earlier LaPena prosecution. The prosecutor did not divert the attention of the grand jury from the facts. See Clem v. State, 104 Nev. 351, 358, 760 P.2d 103, 107 (1988) (overruled on other grounds). We conclude that the grand jury properly "received a fair presentation of the facts. . . ." Clem, 104 Nev. at 358, 760 P.2d at 107.

APP. 266

Finally, LaPena is correct in stating that the testimony of the various witnesses presents a number of testimonial inconsistencies. The weight and credibility of conflicting testimony is a matter for the jury. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Where there is substantial evidence to support the jury's verdict, it will not be disturbed on appeal. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

In order to properly corroborate accomplice testimony, it is enough if circumstances and evidence from other sources tend on the whole to connect the accused with the crime charged. LaPena v. Sheriff, 91 Nev. 692, 696, 541 P.2d 907, 910 (1975). Reasonable inferences are permitted. LaPena v. Sheriff, 91 Nev. at 696, 541 P.2d at 910. The jury may properly consider the "composite of facts and circumstances." See LaPena v. State, 92 Nev. 1, 3, 544 P.2d 1187, 1188 (1976).

In the instant case, Gail Hodges, Weakland's former wife, testified to a series of furtive visits closely tied in time to Hilda Krause's murder. These involved LaPena and Weakland where Weakland demanded that she perform the role of a go-between. The jury could also properly consider that Weakland had a tenuous connection with the Krauses, while LaPena's link was more ominous and direct. In addition, both Maxwell and LaPena tried to plant false leads with the police. LaPena appeared considerably apprehensive when he met with police in order to impart this disinformation. Ms. Hodges testified that Weakland would do anything for LaPena.

The jury was entitled to consider the murder of Hilda Krause as a whole. Her methodical demise with a kitchen knife when she was tightly bound and offered no resistance, while her husband was only beaten and knocked unconscious, raises the

inference that more was at stake than the robbery.[1] Taken together, such factors may be deemed inculpatory, and more than mere coincidence. LaPena v. Sheriff, 91 Nev. 692, 696, 541 P.2d 907, 910 (1975). The jury could conclude that the murder was indeed what had been planned all along, a staged execution.

Having reviewed the record on appeal, and for the reasons set forth above, we have concluded that appellant's additional contentions lack merit. Accordingly, we

ORDER this appeal dismissed.

Mowbray, J.

Springer, J.

Rose, J.

Steffen, J.

Young, J.

cc: Hon. Thomas A. Foley, Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex Bell, District Attorney
Carmine J. Colucci
Gary E. Gowen
Loretta Bowman, Clerk

[1] Jewelry which an accomplice unceremoniously threw away and which troubled Justice Gunderson in his ten-page dissent to LaPena v. State, 92 Nev. 1, 544 P.2d 1187 (1976), would appear to be explained on the basis of a more developed trial record. Weakland secreted away Marvin Krause's valuable diamond-studded watch and ring while giving an accomplice worthless costume jewelry. See LaPena, 92 Nev. at 9 n.3, 544 P.2d at 1192 n.3.

APP. 268

DISTRICT COURT

Clark County, Nevada

JUL 14 3 03 PM '09

THE STATE OF NEVADA, Plaintiff -vs- FRANK RALPH LAPENA, #111655 Defendant,	CASE NO. C59791 DEPT. NO. XIII JUDGMENT OF CONVICTION (JURY TRIAL)

WHEREAS, on the 12th day of October, 1982, the Defendant FRANK RALPH LAPENA, entered a plea of not guilty to the crimes of Count I - MURDER and Count II - ROBBERY WITH USE OF A DEADLY WEAPON committed on the 14th day of January, 1974, in violation of NRS 200.010, 200.030, 200.380, 193.165, and the matter having been tried before a jury, and the defendant being represented by counsel and having been found guilty of the crimes of Count I - MURDER OF THE FIRST DEGREE and Count II - ROBBERY WITH USE OF A DEADLY WEAPON; and

WHEREAS, thereafter, on the 27th day of June, 1989, the defendant being present in Court with his counsel LAMOND MILLS, ESQ., and DAVID P. SCHWARTZ, Chief Deputy District Attorney, also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and sentenced Defendant to Count I - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada State Prison for MURDER OF THE FIRST DEGREE to run concurrently

APP. 269

with Count II and Count II - FIFTEEN (15) years in the Nevada State Prison for ROBBERY plus a consecutive FIFTEEN (15) years in the Nevada State Prison for USE OF A DEADLY WEAPON. $20.00 Assessment Fee. Credit for Time Served 3,357 days.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 13th day of July, 1989, in the City of Las Vegas, County of Clark, State of Nevada.

Thomas A. Foley
DISTRICT JUDGE

82-59791X/kjh
LVMPD DR#74-1881
Murder & Robb w/wpn - F