# ****STATE v. LaPENA****

**The STATE of Nevada, Appellant/Cross-Respondent, v. Frank LaPENA, Respondent/Cross-Appellant.**

**29429. No.**

**-- December 07, 1998**

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

In 1977, respondent/cross-appellant Frank LaPena was convicted of first degree murder and robbery with the use of a deadly This court reversed the conviction and remanded for a new weapon. In 1989, LaPena was again convicted of first degree murder and trial. robbery, and sentenced to life imprisonment without the possibility of In 1992, LaPena filed a parole. This court affirmed the conviction. petition for post-conviction relief (the “PCR petition”), which the district court denied;  this court remanded the case for an evidentiary In December 1993, LaPena filed a motion to dismiss all of the hearing. In 1995, the district court conducted an charges against him. evidentiary hearing and, based on the evidence adduced therein, granted LaPena's PCR petition on the ground that LaPena had been denied The district court denied effective assistance of trial counsel. LaPena's motion to dismiss and ordered a new trial.

The State appeals from the district court's grant of post-conviction relief LaPena cross-appeals from vacating LaPena's conviction and sentence. the district court's denial of his motion to dismiss all charges against We conclude that the district court erred in granting LaPena's him. Consequently we reverse the district court's order and PCR petition. 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 During the course of the robbery, the perpetrators beat community. When police arrived at the Krause Mr. Krause and murdered Mrs. 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 An autopsy revealed that Mrs. Krause had been throat had been slit. 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 The men forced him into the house where into his car to go to work. they beat him and tied him up, murdered Mrs. Krause, and stole a television, gold coins, and jewelry, including a diamond ring and a Mr. Krause reported that after the assailants left his home, he watch.  untied himself and went upstairs in an attempt to aid Mrs. Krause. Physical evidence indicated that at least two perpetrators had been The perpetrators left the scene in Mr. present at the Krause home. Mr. Krause's car but abandoned it at the gates of the country club. 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 Costanza told Det. Whitney that approximately six weeks Mike Whitney. 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 Costanza allegedly knew the would involve scaling a wall of some sort.  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 In a February 1974 telephone questioned Boutwell, Webb, and Weakland. conversation between Lt. Avants and Costanza, Costanza allegedly stated that he had never heard the names of LaPena or Rosalie Maxwell, LaPena's Police girlfriend, associated with Weakland or the Krause crimes. 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 In exchange for this testimony, had hired him to murder Mrs. Krause. 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 In his of which were unrelated to the Krause crimes) were dropped. 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 Weakland maintained that he had not strangled Mrs. Krause or cut. Weakland maintained that LaPena, an stabbed her in the neck. acquaintance to whom he owed money, had approached him at the end of LaPena allegedly December 1973, and asked him to kill Mrs. Krause. explained to Weakland that Mr. Krause was a wealthy slot manager at Caesar's Palace who was dating LaPena's girlfriend, Maxwell, who also LaPena and Maxwell wanted Weakland to kill Mrs. worked at Caesar's. 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 On January 4, large sum of money in exchange for Mrs. Krause's murder. 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 Maxwell the “plan” for robbing the Krauses and murdering Mrs. Krause. allegedly gave Weakland a map of the Krauses' residence during this Weakland stated that he asked Webb to help him commit the meeting. Weakland told police crime but, ultimately, Boutwell accompanied him. 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 The criminal complaint and robbery with the use of a deadly weapon. 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 LaPena v. State, 98 Nev. 135, 136, 643 P.2d 244, murder were false. Maxwell was acquitted at trial, but LaPena was convicted 244 (1982). 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 This court concluded that the State had improperly reversible error. withheld “the benefits of a plea bargain or promise of leniency until after a purported accomplice [ (i.e., Weakland) ] had testified in a Weakland was Id. at 136-37, 643 P.2d at 244-45.  particular manner.” eventually charged with two counts of perjury, to which he entered an Gary Gowen, Esq., assumed LaPena's Alford plea and received probation. 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 Weakland told the grand jury that he had since reached a and Maxwell. 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 After the district court identity of confidential informant Costanza. denied his motion, LaPena filed a petition for a writ of mandamus, which LaPena v. District Court, Docket No. 14640 (Order this court granted. 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 Costanza refused to travel to Nevada and called Lt. Avants Nevada. after meeting with Det. Lee. Costanza told Lt. Avants that he had no additional information to provide with regard to the Krause Upon receipt of Costanza's name and New Jersey robbery/murder. 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](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_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 According to Gowen, the district filing a material witness warrant. Prosecutor Melvyn Harmon maintained attorney's office refused to help. 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 This court reversed the district court's denial of depose Costanza. LaPena v. Moran, Docket No. 16196, 101 Nev. 957, 808 LaPena's motion. P.2d 578 (Order, October 22, 1985).

On January 15, 1985, Costanza Det. Lee and an individual from the Clark was arrested in Florida. County district attorney's office were dispatched to Florida in an attempt to secure Costanza's testimony in Nevada.[2](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_2) Defense investigator Michael Wysocki flew to Florida the following  However, Costanza was released from custody at the conclusion of a day. 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 The those seeking further information with regard to Costanza. district court denied the motion, but this court issued an order that an evidentiary hearing be conducted concerning whether the State had Lapena v. District disclosed all of its information regarding Costanza. 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, At the beginning of this evidentiary hearing, Gowen learned that 1988. he had been relieved as LaPena's counsel. George Carter, Esq., and Lamond Mills, Esq., were appointed to represent LaPena through his Following the evidentiary hearing, the district court second trial. 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 The trial court  LaPena did not testify on his own behalf.  weapon. sentenced LaPena to life imprisonment without the possibility of parole for the murder of Mrs. Krause, and a concurrent thirty-year sentence for This the robbery of the Krause home with the use of a deadly weapon. LaPena v. State, court affirmed LaPena's conviction and sentence. Docket No. 20436, 107 Nev. 1126, 838 P.2d 947 (Order Dismissing Appeal, Gowen assisted LaPena's appellate counsel, Carmine June 27, 1991). Colucci, and argued the case before this court.

On June 3, 1992, The district court denied LaPena filed the PCR petition at issue. On LaPena's PCR petition without conducting an evidentiary hearing. appeal, this court remanded the matter for an evidentiary hearing. Lapena v. State, Docket No. 23839, 109 Nev. 1404, 875 P.2d 1066 (Order  On December 3, 1993, LaPena filed a of Remand, November 24, 1993). motion to dismiss the indictment based upon an alleged lack of evidence LaPena's motion to and “a colorable claim of factual innocence.” 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 The district court denied effective assistance of trial counsel. 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.

“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 State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, independent review.” To establish ineffective assistance of counsel, a 323 (1993). defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient Strickland v. Washington, 466 U.S. performance prejudiced the defense. To establish 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). prejudice, the defendant must show that but for counsel's mistakes, there is a reasonable probability that the result of the proceeding Judicial Id. at 694, 104 S.Ct. 2052.  would have been different. review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might Id. at 689, 104 S.Ct. 2052. be considered sound strategy.

Counsel were not ineffective in their impeachment of Weakland at LaPena's second trial.

  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 testified the State entered into a written agreement with Weakland not to interfere The district court further found with his efforts to obtain parole.” that Mills was aware that Weakland had negotiated with the State for his testimony aga The district court noted the importance of inst LaPena. 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 Rather, we find that Weakland's before the grand jury and at trial. 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 Furthermore, at trial, counsel his original story against LaPena. presented the testimony of psychologist William Mason Knapp, Ph.D., who had extensively evaluated Weakland and found him to be a psychopathic liar.[3](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_3)

LaPena argues that the defense counsel should have obtained expert advice concerning inconsistencies between Weakland's testimony regarding the However, the discrepancies were obvious murder and the autopsy report. enough that, applying the highly deferential standard of Strickland, we Counsel extensively cannot say counsel was deficient in this regard. cross-examined Weakland on inconsistencies between Weakland's testimony as to what he did to Mrs. Krause and the findings of the coroner.[4](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_4)

With regard to impeachment of Weakland based on events in his recent past, During the we conclude that counsel was by no means deficient. 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 Weakland was paroled judge “flat refused to consider” those charges. in 1988.

Weakland also testified at the evidentiary hearing that following his 1988 release, there had been four attempts to revoke his One 1990 incident involved driving with an open container; parole.  Weakland was incarcerated for thirty-five days and re-released on Some time after 1988, Weakland entered a plea to being an parole. ex-felon in possession of a firearm and received a one-year sentence Then, from the court and a one-year violation from the parole board. in 1994, Weakland was imprisoned pending trial for battery and robbery charges arising out of a fight at Baldini's Casino;  he was acquitted Finally, in the following a 1995 trial and immediately released. 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](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_5)

At trial, counsel accused Weakland of murdering a fellow inmate and The trial court deemed this evidence assaulting another individual. inadmissible as Weakland had not been convicted of either crime and the Additionally, counsel tried to crimes did not involve dishonesty. introduce evidence that prior to Mrs. Krause's murder, Weakland had worked for Costanza, who Weakland testified was a loan shark, as “the The trial court held that this line of muscle” or a “body guard.” questioning was also inadmissible.

At the 1989 trial, when asked about his changed story once again implicating LaPena, Weakland testified that since being released from prison in 1988, he had undergone what LaPena describes as “a moral transformation.” [6](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_6) LaPena contends that this testimony “opened the door” for his counsel  who should have impeached Weakland with his behavior after release, LaPena further asserts including Weakland's drinking and gambling. that although during cross-examination at the 1989 trial Mills brought out the fact that Weakland had recently been convicted of hitting 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 another 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 We Strickland, 466 U.S. at 687, 104 S.Ct. 2052.  result is reliable.” Applying an conclude that LaPena has failed to meet this burden. “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.

  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  The parties also his second trial and voluntarily waived that right. We concede that LaPena's testimony went poorly at his first trial. 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 Mills the “expected rigorous and thorough cross-examination.” 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 Also, during the same general time frame as cross-examined by Harmon. the Krause robbery/murder, LaPena was the defendant in another case wherein he had been accused of hiring Weakland and Webb to enforce a LaPena's conviction contract on an individual by the name of Obenauer. in the Obenauer case was reversed, but he was still afraid that this incident might surface if he testified in the Krause case.

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 The State points out that elaborate on what this testimony might be. 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.

LaPena asserts that the witnesses who were called by counsel in his second trial failed to corroborate his potential testimony and in no “way However, several inmates testified for presented a theory of defense.” the defense as to statements made by Weakland while in jail, prior to LaPena's first trial, which indicated that Weakland had falsely Charles Cooper had implicated LaPena in the Krause robbery/murder. testified that in 1974, fellow-inmate Weakland had told him that he had falsely implicated LaPena in the Krause robbery/murder to avoid the Eddie Eckert was a prison friend of Weakland and death penalty. 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 Eckert also claimed that he had spoken with wife would be blamed. LaPena while they were both incarcerated and LaPena had denied being Another inmate, Bernard Ybarra, involved in the Krause robbery/murder. 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 Also, an LVMPD transport officer testified that he had never murder. 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 However, this evidence would not be helpful given the Friday night. 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 Gowen also said Maxwell could contradict slip for Weakland's account. the fact that she took the money she gave to Weakland out of a Bible, However, as the because she would testify that she is agnostic. 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 LaPena himself testified at the evidentiary hearing that acquitted. when the State contacted Maxwell to give testimony in the 1989 trial she At the evidentiary hearing the district court judge was reluctant.  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 She further conspirator and I was not guilty so how could he be?” 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 Mills stated that they perhaps as Mr. LaPena might think they were.” (he, Carter, and LaPena) agreed that Maxwell should not testify because in some areas “she was quite vulnerable and could in effect bring out Mills further information that we did not want to go before the jury.” testified:

I do not know of any witness in which [LaPena] wanted And I know with Rosalie Maxwell because I to call that we did not call. 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 Therefore, reasoning which was made after reasonable investigation. Strickland, 466 U.S. these decisions are “virtually unchallengeable.” at 690, 104 S.Ct. 2052.[7](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_7)

LaPena has not shown prejudice by virtue of counsel's failure to procure Costanza's testimony.

  The district court found that LaPena's counsel could have arranged for Costanza's appearance and that the failure to have Costanza testify at The district court further trial was prejudicial to LaPena's defense. 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 Harmon, the lead prosecutor in both LaPena trials, testified trials. 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 Harmon 1989 was Gowen's alleged inability to get Costanza to Nevada. stated that he had repeatedly told Gowen to use the Uniform Act to Compel the Attendance of Witnesses, codified in NRS Chapter 174, but The State asserts that Gowen deliberately Gowen failed to do so. ignored available means of gaining Costanza's attendance as “a strategic We agree. delay tactic.”

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 Moreover, at the evidentiary hearing, Harmon testified that provided. 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 A errors, the result of the proceeding would have been different. reasonable probability is a probability sufficient to undermine Strickland, 466 U.S. at 694, 104 S.Ct. confidence in the outcome.” LaPena alleges that Costanza's testimony would contradict 2052. Weakland's and therefore is crucial to his defense;  however, all of Costanza's information was generously admitted at trial through reports Furthermore, Costanza wrote a letter and testimony of others involved. to Harmon and stated on several other occasions that he had told the police all that he knew years ago.

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 We conclude that all evidence with regard to the 1989 trial's outcome. 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.

  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 The counsel should have affirmatively pursued such information. 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 Carter testified at the evidentiary hearing that he “got and Mills.  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 Furthermore, Gowen remained involved in LaPena's case through Carter. the second direct appeal.

According to LaPena, he did not discover that Gowen had received valuable information from Costanza until the During the evidentiary hearing, Gowen stated 1995 evidentiary hearing. that he had not given LaPena any details about his 1983 conversation Gowen testified with Costanza until after LaPena's 1989 conviction. that there was information he never wrote down pertaining to LaPena's case because he was paranoid about someone breaking into his office; Because  however, he does not specify the nature of this information. 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.

  The district court found that proper investigation would have revealed a connection between Mr. Krause and Weakland and would have consequently The impeached Weakland's claim that he did not know Mr. Krause. 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 Ted Martinez then contention from both trials that he had not. testified that he and Weakland had worked together as waiters at a Las LaPena asserts that it was only through Martinez' Vegas restaurant. 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 Moreover, Martinez did not that Weakland knew the Krauses personally. 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 LaPena relies on Krause residence on the morning of January 14, 1974. 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 LaPena asserts that all of this “exculpatory when he left the scene. information” combined with Martinez' testimony at the evidentiary hearing demonstrates his factual innocence and his trial counsel's We disagree. failure to properly investigate his case.

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 Weakland evidence that LaPena hired Weakland to commit the murder. never named anyone other than LaPena as the person who hired him to kill Also, Webb testified at the 1989 trial that Weakland had Mrs. Krause.  told him that LaPena and Maxwell had hired him to kill Mrs. Krause. Weakland's accomplice, Boutwell, also testified that LaPena had An inmate who had shared a orchestrated the plan to kill Mrs. Krause. cell with LaPena testified at the second trial that LaPena had admitted Det. Lee testified that his involvement in Mrs. Krause's murder. shortly after the murder, LaPena accompanied Maxwell to the police station for questioning, and when officials interviewed LaPena he was One week quite upset and emotionally fell apart during the interview. later LaPena, still extremely nervous, contacted Det. Lee to tell him that the person who killed Mrs. Krause was an individual identified only Telephone records admitted into as “Charlie the knife from Chicago.” 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 Having concluded that LaPena was properly prejudice under Strickland. 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](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_8)

I would affirm the district court's judgment.

The LaPena was convicted in murder was committed in January of 1974. As stated in the majority opinion, 1977, almost twenty-two years ago. 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 If this were a relatively clear case, involving a dissenting opinion. 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 The would be just and proper to go ahead now with such a prosecution. A present case is certainly not a clear or straightforward case. 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.

The district court conducted hearings on LaPena's post-conviction proceedings and The district court took evidence and made certain findings hearings. I see no of fact that I do not think should be violated by this court. reason to intrude into the district court's discretion or to set aside I dissent the district court's dismissing the charges against LaPena. from this court's overruling of the district court's proper ruling in this case.

FOOTNOTES

[1](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_ref_1%22%20%5Co%20%221).   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](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_ref_2%22%20%5Co%20%222).   Gowen claimed that he never saw the State's inter-office memorandum  memorializing the Florida meeting between Costanza and Det. Lee.

[3](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_ref_3%22%20%5Co%20%223).   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](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_ref_4%22%20%5Co%20%224).   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](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_ref_5%22%20%5Co%20%225).   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.

[6](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_ref_6%22%20%5Co%20%226).   Weakland stated:  “You know, I lost my values in life there a few years  My family stuck through with me ․ And they have constantly back. And I owe that to them, and I want to do what's right.” stuck by me.

[7](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_ref_7%22%20%5Co%20%227).   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 We are not constructing defenses;  rather, we conclude that offer.” LaPena has failed to “overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial Strickland, 466 U.S. at 689, 104 S.Ct. 2052 (quoting strategy.’ ” Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 We note that Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1955)). (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.

[8](http://caselaw.findlaw.com/nv-supreme-court/1091322.html%22%20%5Cl%20%22footnote_ref_8%22%20%5Co%20%228).   The Honorable Charles E. Springer, Chief Justice, appointed the  Honorable David Zenoff, Senior Justice, to sit in the place of the 19;  SCR Nev. Const. art. 6, § Honorable A. William Maupin, Justice. 10.

ROSE, J.

YOUNG, SHEARING, JJ. and ZENOFF, Sr.J., concur.