No. 07-7

In The
Supreme Court of the United States

A. J. ARAVE,

Petitioner,

v.

MARK HENRY LANKFORD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE G. WASDEN
Attorney General of Idaho

L. LAMONT ANDERSON*
Deputy Attorney General
Chief, Capital Litigation Unit
Criminal Law Division
700 W. State Street
Boise, Idaho 83720-0010
Telephone: (208) 334-4539

Attorneys for Petitioner

**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

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CAPITAL CASE

QUESTIONS PRESENTED

Respondent Mark Lankford and his brother, Bryan, were convicted of felony-murder in separate trials. Lankford's trial counsel submitted, and the trial court gave, three jury instructions regarding the corroboration of an accomplice, one of which conflicted with the other two and Idaho law. Failing to consider a fourth instruction explaining Bryan "was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration," the Ninth Circuit concluded, "a conscientious jury might read instructions 15 and 18 together to state a general rule and its exception." Failing to recognize Lankford was charged with felony-murder and examining Idaho cases instead of the jury instructions as a whole, the Ninth Circuit further concluded the Idaho Supreme Court demands "substantial evidence of corroboration," and that the "only evidence tending to show that Mark was the killer was his brother's word."

1. Because the Ninth Circuit used an incorrect standard in assessing the prejudice prong of *Strickland v. Washington*, and failed to examine the instructions as a whole, did the court err by expanding the number of cases in which collateral relief will be granted and overburdening defense counsel such that the criminal justice system will suffer?

2. Because Lankford was not charged with premeditated murder, the Ninth Circuit used an improper state corroboration standard and since the state provided sufficient evidence to connect Lankford to the robbery, did the Ninth Circuit reduce the standard for ineffective assistance of counsel and destroy principles of comity and federalism by imposing a standard that is contrary to Idaho law?

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

The Attorney General for the State of Idaho, on behalf of A. J. Arave, Warden of the Idaho Maximum Security Institution, respectfully petitions for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, which overturned a twenty-two-year-old first-degree murder conviction and death sentence.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, App. *infra*, at 1-27, is reported at *Lankford v. Arave*, 468 F.3d 578 (9th Cir. 2006).

JURISDICTION

The opinion of the Ninth Circuit was filed November 7, 2006. App. at 1. On January 29, 2007, the Ninth Circuit denied Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc. App. at 58. Petitioner requested and received two extensions of time to file his Petition for Writ of Certiorari to and including June 28, 2007. This case arose under 28 U.S.C. § 2254 and Petitioner invokes the jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides:

> 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 defense.

STATEMENT OF THE CASE

In June 1983, Lankford and his brother, Bryan, packed their belongings, fled from their home state of Texas because Bryan had violated probation for a robbery conviction and eventually made their way to a forest campground in Idaho County, Idaho, where they camped for several days. App. at 70-71. Retired Marine officer Robert Bravence and his wife, Cheryl, were vacationing in a nearby campground. *Id.* at 71. On July 5, one week after Robert's mother reported her son and his wife missing, the Bravences' van was located at a bus terminal in Los Angeles. *Id.* at 2, 71. Lankford's fingerprints were located in the van and his signature was on credit slips for food and lodging purchased with the Bravences' credit cards. *Id.* at 2. In September 1983, hunters discovered Robert and Cheryl's bodies in a remote area, both having died

from multiple blows to their skulls. *Id.* at 71-72. Lankford's Camaro was found only one-fourth of a mile from the bodies in the same general remote area. *Id.* at 2.

In October, Lankford and Bryan were arrested at a remote campsite in Liberty County, Texas. *Id.* at 71. Numerous items belonging to the Bravences were subsequently found at the site. *Id.* When police interviewed Bryan, he explained both brothers went to the Bravences' campsite:

> Mark came running into the camp and told the man to get on the ground so he did and Mark pulled out a stick like a night stick that a policeman wears but only about a foot long and hit the man on the back of the neck [k]nocking him out he hit the man at least twice and the lady came up a few seconds latter [sic] and Mark told here [sic] to get down on the ground also and she did and then he hit her once I think. . . .

Id. at 3.

Lankford and Bryan were charged with two counts of felony-murder stemming from injuries inflicted when the Bravences were robbed. *Id.* at 71, 164-67. Bryan, who was tried first, agreed to testify for the state against Lankford and told the jury that after reaching the Idaho forest, they hid out and decided to steal a car from someone in the area because Lankford's car payments were delinquent and police would be searching for it. *Id.* at 71. The brothers abandoned Lankford's car in the forest, covered it with brush, and set forth to steal another car. *Id.* Eventually arriving at the Bravences' campsite, Bryan walked into the campsite first with a shotgun draped over his arms and engaged the Bravences in conversation. *Id.* at 71-72. Lankford ran out from behind some bushes where he had

been hiding, ordered Robert to kneel on the ground and hit him on the head with a nightstick. *Id.* at 72. Cheryl, who had gone down to a nearby stream for water, returned and rushed to her husband who was lying on the ground. *Id.* Lankford ordered her to kneel on the ground next to her husband and struck her on the back of the neck with the same nightstick. *Id.*

Lankford did not testify, but in statements to his attorney contended that after the brothers became separated, Bryan returned to the car in the Bravences' van and confessed to striking the Bravences with the shotgun stock. *Id.* at 4. The brothers returned to the Bravences' campsite where Lankford contended he located the two victims with their heads lying in a pool of blood. *Id.* at 5.

The brothers agreed they loaded the two bodies into the van and drove back to their campsite where Lankford hid the bodies near his Camaro, after which they drove the Bravences' van to Oregon and later to California where it was abandoned in Los Angeles, using the Bravences' credit cards to purchase food and accommodations. *Id.*

In preparing for trial, Lankford's attorney, Gregory FitzMaurice, conducted extensive research regarding jury instructions, traveling to the University of Idaho law school library, reviewing California and federal patterned instructions and, after reviewing Idaho law, drafted instructions to submit to the trial court. *Id.* at 12, 42. As a result of his research, FitzMaurice requested three instructions regarding accomplice testimony, which were given by the trial court as instructions 15, 18 and 19. *Id.* at 7-9, 42-44, 150-51. Instruction 15 reads as follows:

> An accomplice is one who unites with another person in the commission of a crime, voluntarily

> and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury, even though not corroborated by other evidence, and given such weight as the jury feels it should have. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.
>
> You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

App. at 51.

That portion of the instruction stating accomplice testimony "may be received in evidence and considered by the jury, even though not corroborated by other evidence," is contrary to I.C. § 19-2117, which requires corroboration that "tends to connect the defendant with the commission of the offense."

Instructions 18 and 19, also submitted by FitzMaurice, are correct statements of Idaho law. Instruction 18 reads as follows:

> You are instructed that a defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.

App. at 151. Instruction 19 reads as follows:

> To corroborate the testimony of an accomplice there must be evidence of some act or fact

> related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged.
>
> However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.
>
> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.
>
> If there is not such independent evidence which tends to connect defendant with the commission of the offense, the testimony of the accomplice is not corroborated.
>
> If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

Id. at 151-52.

Both brothers were convicted of felony-murder and sentenced to death, although the Supreme Court later overturned Bryan's death sentence and he was given a life sentence. *Id.* at 30. Bryan subsequently recanted his trial testimony on several occasions and recanted his recantations. *Id.* at 5. Bryan's latest recantation was in an April 2003 letter to Lankford's appellate attorney where he assumed full responsibility for the murders and contended Lankford was not involved. *Id.* at 6. In a consolidated

appeal, the Idaho Supreme Court affirmed Lankford's conviction, death sentence and the denial of post-conviction relief. *Id.* at 70-106.

Lankford filed a federal habeas petition, which included several ineffective assistance of counsel claims that were initially dismissed because they were not properly presented to the Idaho courts. *Id.* at 6. After the Ninth Circuit's decision in *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001), the parties stipulated to remand Lankford's case for further proceedings, resulting in an evidentiary hearing. App. at 6-7, 31-32. Addressing Lankford's contention that FitzMaurice was ineffective for submitting instruction 15, the district court concluded Lankford demonstrated deficient performance but, because of the other instructions, failed to establish that, but for counsel's error, the result of the trial would have been different. *Id.* at 42-46. The court denied relief on all other claims.

Although the court recognized it is a "harder" and "close" question, *id.* at 14, 26, the Ninth Circuit, addressing only Lankford's claim regarding the instructions, reversed the district court's finding of prejudice. Rejecting the state's argument and the district court's conclusion that the instructions as a whole overcome any prejudice stemming from instruction 15, the court concluded, "a conscientious jury **might** read instructions 15 and 18 together to state a general rule and its exception." *Id.* at 15 (emphasis added). Examining whether there was sufficient corroboration, the court examined Idaho cases and opined, "Idaho cases suggest that, where the trial court has refused a corroboration instruction under § 19-2117, the Idaho Supreme Court has demanded substantial evidence of corroboration before it will find the error harmless." *Id.* at 19. Even though Lankford was charged

with felony-murder and not premeditated murder, the court then concluded, "The only evidence tending to show that **Mark was the killer** was his brother's word." *Id.* at 21 (emphasis added).

REASONS FOR GRANTING THE PETITION

In this habeas proceeding, the Ninth Circuit adopted a standard, not supported by this Court's precedents and in conflict with the rulings of other circuits, that greatly reduces the standard defendants must meet to establish ineffective assistance of counsel claims that are based upon counsel's submission of jury instructions. The Ninth Circuit's conclusion that "a conscientious jury **might** read instructions 15 and 18 together to state a general rule and its exception," and the court's failure to review the instructions as a whole, expands the number of cases in which collateral relief will be granted because of the *de minimus* burden imposed by the court to establish prejudice and results in a standard "so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). Intervention by this Court to prevent such an expansion of the Sixth Amendment right to counsel is required.

The Ninth Circuit also failed to recognize that, because Lankford was charged with felony-murder, under state law the prosecutor was not required to corroborate Lankford's involvement in the murder, but merely his involvement in the underlying felony, robbery. Because the Ninth Circuit also applied an incorrect state law standard for corroboration and failed to determine whether there

was sufficient corroboration of the robbery, the court erred by reversing the district court and granting habeas relief.

A. *Strickland* Prejudice Requires A Reasonable Probability Of A Different Result Based Upon The Instructions As A Whole

To prevail on a claim of ineffective assistance of counsel, Lankford must show his counsel's representation was deficient and that the deficiency was prejudicial. *Strickland*, 466 U.S. at 687. Because Lankford has the burden of establishing both prongs, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697.

Prejudice requires that Lankford show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. This requires that Lankford demonstrate "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." *Id.* at 694. In making such a determination, a reviewing court "must consider the totality of the evidence before the judge or jury." *Id.* at 695.

Determining whether an ineffective assistance of counsel claim based upon jury instructions meets the *Strickland* prejudice standard, the circuits, relying upon *Cupp v. Naughton*, 414 U.S. 141, 147 (1973), have examined the instructions "as a whole." *See e.g., Conner v. McBride*, 375 F.3d 643, 668 (7th Cir. 2004) ("Jury instructions are properly considered in their entirety whether

alleged as the basis for overcoming procedural default, or as the basis for an ineffective assistance of counsel claim"); *Mello v. Dipaulo*, 295 F.3d 137, 150 (1st Cir. 2002) (affirming the state court's examination of the instructions as a whole in denying an ineffective assistance of counsel claim); *Campbell v. Coyle*, 260 F.3d 531, 557 (6th Cir. 2001) (affirming the district court's examination of the instructions as a whole in describing the elements of aggravated murder in denying an ineffective assistance of counsel claim); *United States v. Flynn*, 87 F.3d 996, 1001 (8th Cir. 1996) ("The instructions, taken as a whole, were not incorrect").

The lower courts have also required defendants to meet the standard in *Boyde v. California*, 494 U.S. 370, 380 (1990), "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *See e.g.*, *Jacobs v. Horn*, 395 F.3d 92, 114 (3rd Cir. 2005) ("there is no reasonable likelihood that the outcome of the proceedings would have been any different"); *Peterson v. Murray*, 904 F.2d 882, 889 (4th Cir. 1990) ("we do not think there is a reasonable likelihood that the jury, considering the language in context, would have understood the instructions as placing the burden on Peterson"); *Klvana v. California*, 911 F. Supp. 1288, 1296 (C.D. Cal. 1995) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)) ("we inquire whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution").

While the Supreme Court has not determined "whether there is a difference between the 'reasonable likelihood' and 'reasonable probability' standards," *United States v. Gonzalez-Gonzalez*, 258 F.3d 16, 22 (1st Cir.

2001), and the circuits are divided on the question of whether there is a difference, *compare United States v. Steinberg*, 99 F.3d 1486, 1490 (9th Cir. 1996); *United States v. Gonzales*, 90 F.3d 1363, 1368 n.2 (8th Cir. 1996); *United States v. Alzate*, 47 F.3d 1103, 1109-10 (11th Cir. 1995); *Kirkpatrick v. Whiteley*, 992 F.2d 491, 497 (5th Cir. 1993); *United States v. O'Dell*, 805 F.2d 637, 641 (6th Cir. 1986); *United States v. Kluger*, 794 F.2d 1579, 1582 n.4 (10th Cir. 1986); *United States v. Jackson*, 780 F.2d 1305, 1309 (7th Cir. 1986); *but see United States v. Boyd*, 55 F.3d 239, 245 (7th Cir. 1995); *United States v. Sutton*, 542 F.2d 1239, 1242 & n.3 (4th Cir. 1976), even if the standards are the same, a "reasonable probability" is more than a mere "possibility," *see Fields v. Woodford*, 309 F.3d 1095, 1107-08 (9th Cir. 2002) ("This requires showing more than the possibility that he was prejudiced by counsel's errors"). A "reasonable probability" does not require a showing that "counsel's deficient conduct more likely than not altered the outcome in the case," rather, a defendant must show the error "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test [citation omitted] and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* The Supreme Court has explained that testimony which "**might** have changed the outcome of the trial," does not rise to the level of a "'reasonable probability' that the result of the trial would have been different." *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (emphasis added).

While the Ninth Circuit cited the appropriate standard for determining whether Lankford had established that FitzMaurice's submitted instruction was prejudicial, App. at 14, in its final analysis the court used words that significantly reduced the standard from a reasonable likelihood to a mere possibility or "conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. For example, the court concluded, "[t]he two statements **seem** to be bridged by the last sentence of instruction 15"; "[t]his line **appears** to create an exception"; and, more significantly, "a conscientious jury **might** read instructions 15 and 18 together to state a general rule and its exception." App. at 15 (emphasis added). This is not the appropriate standard upon which prejudice can be found.

The requirement that instructions be examined "as a whole," *Cupp*, 414 U.S. at 147, is consistent with the requirement that ineffective assistance of counsel claims be considered based upon the "totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. Admittedly, the Ninth Circuit examined all three instructions submitted by FitzMaurice and then concluded the phrase in instruction 15 – "unless you believe that unsupported testimony beyond a reasonable doubt" – "appears to create an exception to instruction 18's warning not to credit uncorroborated testimony." App. at 15. However, because the Ninth Circuit failed to examine all of the instructions "as a whole," the court failed to recognize instruction 20 eliminated any possibility of an exception to instruction 18 by stating:

> If the crime of murder in the first degree was committed by anyone, the witness Bryan Stuart Lankford was an accomplice as a matter of law

> and **his testimony is subject to the rule requiring corroboration.**

App. at 152 (emphasis added).

As recognized by the Ninth Circuit, "there is overwhelming evidence that one or both of the Lankford brothers killed the Bravences." App. at 16. Therefore, the instructions, "as a whole," are not contrary to Idaho law because there was overwhelming evidence that the "crime of murder in the first degree was committed by ['one or both of the Lankford brothers']" and the jury was expressly instructed Bryan "was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration." App. at 152.

Had the Ninth Circuit utilized the correct standard, examined the instructions as a whole and not diminished Lankford's burden, thereby expanding the number of cases in which collateral relief will be granted, Lankford's case would not be "harder" or "close," and the district court would have been affirmed.

B. The Prosecutor Was Required Only To Corroborate Bryan's Testimony That Lankford Was Involved In The Robbery

In determining Lankford established prejudice, the Ninth Circuit reviewed Idaho law regarding corroboration and concluded, "The only physical evidence presented at trial was circumstantial, and all of that evidence also linked Bryan to the murders. The only evidence tending to show that **Mark was the killer** was his brother's word." App. at 21 (emphasis added). Because Lankford was charged with felony-murder and not premeditated murder, Idaho law did not mandate "evidence tending to show that

Mark was the killer," but only that he was "connected with the commission of the [robbery]." *State v. Scroggins*, 716 P.2d 1152, 1158 (Idaho 1986).

As explained by the Idaho Supreme Court, "the proof of a murder in the first degree is established in all of its elements by proving (a) the unlawful killing of a human being (b) in the course of a robbery. The requirement of 'malice aforethought' is satisfied by the fact the killing was committed in the perpetration of a robbery." App. at 77; *see also Scroggins*, 716 P.2d at 1158 ("In a prosecution for felony-murder, the state is relieved of the burden of proving that a defendant had the specific intent to kill and instead need only prove that all individuals charged as principals had the specific intent to commit the predicate felony").

The jury was expressly instructed regarding these general principles of Idaho law. App. at 154-55. The jury was further instructed, "it is therefore not necessary that the State prove that this defendant actually committed the act which caused the death of the victims, provided the State prove beyond a reasonable doubt that the defendant was present, and that he aided and abetted in the commission of the crime of robbery as alleged, or that if he was not present, that he advised and encouraged the commission of such crime." App. at 158. Finally, the jury was instructed as follows:

> If a human being is killed by any one of several persons engaged in the perpetration of the crime of robbery, all persons who either directly and actively commit the act constituting robbery or who with knowledge of the unlawful purpose of the perpetration of the crime aid and abet in its commission, are guilty of murder of the first

> degree, whether the killing is intentional or unintentional.
>
> Thus, if two or more persons acting together are perpetrating a robbery and one of them, in the course of the robbery and in furtherance of the common purpose to commit the robbery, kill a human being, both the person who committed the killing and the person who aided and abetted him in the robbery are guilty of Murder of the First Degree.
>
> A killing that occurs within the perpetration of a robbery embraces not only the actual acts of the transaction, in this case the robbery, and the circumstances surrounding it, but also those acts immediately following it and so closely connected with it as to form in reality a part of the occurrence.
>
> However, where a robbery has been completed prior to the killing and such time has elapsed as to make the killing not a part of the circumstances of the robbery, then and in that event, the defendant can not be convicted of first degree murder.

App. at 160-61.

While the Ninth Circuit examined numerous Idaho cases to conclude, "where the trial court has refused a corroboration instruction under § 19-2117, the Idaho Supreme Court has demanded substantial evidence of corroboration before it will find the error harmless," App. at 19, the court should not have relied upon prior Idaho cases to determine if sufficient corroboration was presented, but should have relied upon the instructions,

particularly instruction 19, App. at 151-52, which followed the requirement for corroboration under I.C. § 19-2117.

Further, even if Idaho cases are examined, because the trial court did not **refuse** to give a corroboration instruction, but merely gave conflicting instructions, the Ninth Circuit's conclusion, that "the Idaho Supreme Court has demanded substantial evidence of corroboration," is also a misstatement of Idaho law. In *State v. Evans*, 631 P.2d 1220, 1222 (Idaho 1981) (quoting *State v. Gillum*, 228 P. 334, 336 (Idaho 1924)), the Idaho Supreme Court discussed the degree of corroboration necessary to comply with the statute:

> No general rule can be stated with respect to the quantum of evidence corroborating an accomplice's testimony which is necessary to warrant a conviction, each case must be governed by its own circumstances, **keeping in view the nature of the crime, the character of the accomplice's testimony, and the general requirement with respect to corroboration.** Where the circumstances point to the guilt of the accused, independent of the accomplice's testimony, such circumstantial evidence may be a sufficient corroboration of the accomplice's testimony to sustain a conviction. It is not necessary that the testimony of an accomplice be corroborated in every detail. **Any corroborative evidence legitimately tending to connect the defendant with the commission of a crime may be sufficient to warrant a conviction, although standing by itself it would not be sufficient proof of defendant's guilt.** (Emphasis added).

In *State v. Garcia*, 630 P.2d 665, 672 (Idaho 1981) (quoting *State v. Bassett*, 385 P.2d 246, 248 (Idaho 1963))

(citations omitted), the Idaho Supreme Court reaffirmed the "applicable standards for determining whether an accomplice's testimony is sufficiently corroborated to satisfy the requirements of I.C. § 19-2117":

> It is not necessary that there be corroborating evidence concerning every material fact as to which the accomplice testified. The statute permits convictions upon the testimony of an accomplice with the limitation that the accomplice shall be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and hence the corroboration be independent of the testimony of the accomplice and connect or tend to connect the defendant with the commission of the crime charged. **Corroboration of an accomplice need only connect the accused with the crime, it may be slight, and need only go to one material fact. It may be entirely circumstantial.** The jurors are the judges of the weight and credibility of the testimony under proper instructions. (Emphasis added).

"[A]n innocent explanation does not strip the evidence of its corroborative character," *State v. Hill*, 97 P.2d 1014, 1019 (Idaho Ct. App. 2004), and merely because an accomplice's testimony is vital to the state's case does not change the level of corroboration required, *see State v. Jones*, 873 P.2d 122, 126 (Idaho 1994) ("Wystrach's testimony was integral to the prosecution's case, providing first-hand knowledge of the conspiracy, its subject matter and payoffs").

"Keeping in view the nature of the crime," *Evans*, 631 P.2d at 1222, it is logical to examine robbery and felony-murder cases to determine whether Bryan's testimony was sufficiently corroborated. In *State v. Fetterly*, 710 P.2d

1202, 1205 (Idaho 1985), the defendant was charged with both premeditated murder and felony-murder based upon a murder committed during the course of a burglary. Addressing the defendant's challenge to his felony-murder conviction, the court explained the victim's death "was part of a stream of events which began the evening Fetterly and Windsor entered Grammer's home and ended the following day when Grammer's possessions were removed from the home." *Id.* at 1207-08.

In *Evans*, 631 P.2d at 1222, the testimony of a criminalist who testified only that it was possible two hairs taken from a ski mask belonged to the defendant, and the testimony of the victim regarding only the robber's eyes and nose, was sufficient evidence to corroborate an accomplice's testimony. In *State v. Pierce*, 685 P.2d 837, 842 (Idaho 1984), a case similar to Lankford's, the supreme court concluded testimony establishing the defendant was seen with his two accomplices driving the getaway car before the robbery and driving the car more than thirty minutes after the robbery was sufficient to corroborate the testimony of the accomplices.

Based upon Idaho's felony-murder and robbery cases, Bryan's testimony was sufficiently corroborated with more than "the testimony of the state's pathologist, Dr. Robert Cihak." App. at 21. As explained in the prosecutor's closing statement, there was significant evidence supporting Bryan's testimony, particularly "the time sequence" and Lankford's statements to Roy Ralmuto. On the day of the Bravences' murders, at approximately 10:00 a.m., Art Goodloe saw a man and woman near a greenish Volkswagen van. When Goodloe returned at approximately 3:30-4:00 p.m. he saw the two people and van near Sheep Creek campground. That same evening at approximately 6:30

p.m., Darrell Cox picked up Bryan and Lankford who was carrying a shotgun. At Lankford's request, Cox dropped them off at McAllister campground. Chris Damman and his wife Julie corroborated Cox's testimony, explaining they were at McAllister campground when Cox dropped off the Lankfords at approximately 7:30 p.m. The Lankfords "sort of stood around by the car" making Julie "scared" because "[t]hey weren't real clean, and the gun, and the way they stood around, and they had no – there was no other vehicle there. And that sort of – my mom and I sort of wondered why he was letting them off since there was no houses around that area or anything." The brothers were there for approximately 15-20 minutes and then went "down towards the river."

Ernest Wells and Deputy Jon Stroop detailed the distances between the locations, including McAllister and Sheep Creek campgrounds, Summit Flat where the two bodies were recovered, and the location where the Lankfords concealed the Camaro they had driven from Texas. Lee VonBargen explained it took approximately two hours to travel from Summit Flat to Grangeville. Leo Pils testified regarding the distance and time to drive from Grangeville to Pendleton, Oregon. Based upon the time frame, the prosecutor established significant corroboration permitting him to argue, "Now if Mark wasn't there and wasn't involved and Bryan did this all, they would have had to make a reservation to have Mark have Bryan pick Mark up. I suggest and submit to you . . . that is absolutely unreasonable."

Lankford's finger and palm prints taken from various items inside the Bravences' van further corroborate Bryan's testimony that his brother was involved in the robbery.

Additionally, Ralmuto testified regarding a conversation with Lankford after Lankford returned to Texas. Lankford said, "We've got to get out of here and get out of here now." When Ralmuto left Lankford at the Trinity River, Lankford came to Ralmuto, shook his hand and said, "I would never see him alive again nor Bryan alive again. And, then, he sort of waited a minute, and he said: Well, you might see Bryan alive again, but I can promise you you won't see me alive again." As explained by the prosecutor, "Is that the kind of comment that someone who had only been involved in the use of the credit cards and possession of the stolen property would make? Is that a situation where you'd go back in the brush and spend the rest of your life? I submit not."

Finally, Bryan did not commit the robbery and murders alone. Robert, a retired marine, "was physically in very good shape." Based upon Bryan's stature, Robert's physical condition and desire to protect his young wife, it is unreasonable to believe Bryan's subsequent stories regarding how he allegedly robbed and murdered the Bravences without his brother's assistance.

Based upon all the evidence and a correct standard of Idaho law, the state connected Lankford to the robbery. Because sufficient corroboration was presented to the jury regarding his involvement in the robbery, Lankford failed to establish, based upon a reasonable probability, that the outcome of his trial would have been different if FitzMaurice had not submitted the erroneous instruction.

By requiring the prosecutor to corroborate Bryan's testimony that Lankford "was the killer" and then applying an incorrect state standard requiring "substantial evidence of corroboration," the Ninth Circuit drastically

reduced the standard for ineffective assistance of counsel and destroyed principles of comity and federalism, in violation of this Court's precedents, by imposing a standard that is contrary to Idaho law.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted and the judgment of the Ninth Circuit Court of Appeals be reversed.

Respectfully submitted,

LAWRENCE G. WASDEN
Attorney General of Idaho

L. LAMONT ANDERSON*
Deputy Attorney General
Chief, Capital Litigation Unit
700 W. State Street
Boise, Idaho 83720-0010
Telephone: (208) 334-4539
Attorneys for Petitioner

**Counsel of Record*

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