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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RICHARD A. LEAVITT, Petitioner, vs. A.J. ARAVE, Warden, Idaho State Correctional Institution, Respondent.	Case No. CV 93-0024-S-BLW CAPITAL CASE **REPLY BRIEF IN SUPPORT OF PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO F.R.Civ.P. 60(b) AND APPLICATION FOR STAY OF EXECUTION**

1. *Introduction*

This Reply will first address the procedural posture of the case, then consider the claim that the motion should be denied before reaching the merits of the issues, and will finally address

the specific claims before the court, demonstrating that this court should finally address four specific claims of ineffective assistance of counsel fully in an evidentiary hearing.

Even though no death warrant was issued at the time the present motion was filed, this Court should enter a stay of the warrant obtained by the State a week later in order to assure that Mr. Leavitt is afforded the benefits of Local Rule 9.2(c) which calls for a stay to be entered "for the duration of the proceedings in this court."[1]

2. *The Current Procedural Posture of the Case*

After the initial filings and the filing of the First Amended Petition, this Court first addressed the question of the State's assertion that a number of claims were procedurally defaulted. That briefing occurred in 1996 and after oral argument, this Court issued its decision holding in part that claim 9 (alleging ineffective assistance of counsel) was procedurally defaulted, thereby dismissing that claim from the Petition. Contrary to Respondent's assertion, this Court did not deny this claim on the *merits* in its subsequent decision on the claims remaining after the 1996 decision. *Cf.* Dkt. #120, p.3 and Respondent's Brief, p. 7.[2]

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[1]In 1993, when Mr. Leavitt's petition was first filed, the State had not sought a death warrant so that this Court did not enter its normal stay for the duration of the proceedings in this Court. Seizing on this anomaly, the State immediately went to the state district court upon the issuance of the mandate to obtain an execution date, knowing that Petitioner had filed his Rule 60(b) motion including a request for this Court to act pursuant to F.R.Civ.P. 62.1. Now Respondent claims that no stay should issue demanding immediate action by the federal court outside the normal processing of capital cases under the local rules.

[2] The Ninth Circuit noted that two of the ineffective assistance claims were improperly denied on procedural default grounds and in dicta stated that the claims "do lose on the merits." *Leavitt v. Arave,* 383 F.3d 809, 840, n. 40. But this petition was filed before AEPDA, and this Court was required to consider non-defaulted claims *de novo* and not simply on the record before the State court. Because this Court held no hearings on the merits of any ineffective assistance of

In 2001, Petitioner filed a cross-appeal after this Court granted relief on other grounds. In his appellate briefs Petitioner addressed the procedural default issues claiming that under the Idaho consolidated statute he was entitled to effective assistance of counsel in post-conviction petitions in Idaho. *See*, Leavitt's Opening Brief, Reply Brief and Petition for Hearing en banc.[3]

Upon remand, this Court granted relief on sentencing in 2007, and the State again appealed. The Ninth Circuit reversed and the Supreme Court denied certiorari on May 14, 2012.[4]

Petitioner then filed this motion on May 11, 2012, before the decision on his certiorari petition and *before* the State sought a death warrant in state district court.

3. *Leavitt's Rule 60(b) Motion is Not a Successive Petition*

Respondent first claims that consideration of his Rule 60(b) motion must be considered a successive petition required to meet the strict requirements of 28 U.S.C. § 2244(b). Respondent's assertion that "Leavitt's motion is in stark contrast because it does not involve AEDPA's statute of limitation" must be rejected. (Resp. Brief, p. 11.) The Supreme Court in *Gonzalez* resolved this very question:

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counsel claim before 2007, this Court retains the power under Rule 60(b) to consider additional evidence to determine the merits of Petitioner's pending motion.

[3]Given the consensus among the circuits and in the Supreme Court in 2000, Petitioner did not seek certiorari on the procedural default issue.

[4] Petitioner did not raise a claim similar to the question then presented before the Supreme Court in *Martinez v. Ryan,* which addressed solely whether there is a Sixth Amendment right to counsel in state court proceedings, not whether ineffectiveness of counsel would provide cause for an otherwise valid state procedural default rule. In fact, the Supreme Court rejected the argument that defendants had a Sixth Amendment right to counsel in state post conviction proceedings.

> The term "on the merits" has multiple usages. See, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp*., 531 U.S. 497, 501-503, 149 L. Ed. 2d 32, 121 S. Ct. 1021 (2001). We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d). When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim. *He is not doing so when he merely asserts that a previous ruling which precluded a merits determination was in error--for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.*

Gonzalez v. Crosby, 545 U.S. 524, 532, n. 4 (emphasis added).

Rather than being "in stark contrast" to *Gonzalez*, Petitioner's motion falls squarely within its dictates.[5] *Gonzalez* expressly notes that a procedural default ruling is not a merits ruling, but is procedural. Thus, petitioner's motion is not a successive petition and this Court must consider it as a properly filed Rule 60(b) motion.[6]

4. Application of the Phelps Factors Mandates Rule 60(b) Review in this Case

In *Phelps v. Alameida,* 569 F.3d 1120 (9th Cir. 2009), the Ninth Circuit considered the purpose of Rule 60(b) in light of the Supreme Court's decision in *Gonzalez*:

> The United States Supreme Court has made clear that the equitable power embodied in Rule 60(b) is the power "to vacate judgments whenever such action is appropriate to accomplish justice." Given that directive, we agree that "the decision to grant Rule 60(b)(6) relief" must be measured by "the incessant command of the court's conscience that justice be done in light of all the facts."

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[5]To the extent that the dicta from *Pizzuto v. Blades*, 673 F.3d 1003, 1008 (9th Cir. 2012) differs from the clear language of the Supreme Court, this Court must disregard it. Pizzuto filed his motion for permission to file a successive petition in the Court of Appeals and the court decided that motion *before Martinez* was decided. Should Pizzuto move for relief under Rule 60(b), the court may reconsider its dicta on the procedural default issue, as the dicta is in obvious conflict with the controlling ruling of the Supreme Court in *Gonzalez*.

[6]In *Villegas Lopez v. Ryan*, 2012 WL 1676696 (May 15, 2012), the Ninth Circuit did not reach the State's claim that the motion was in fact a successive petition.

Id. at 1141 (footnotes omitted).

The Phelps court then set forth a number of factors for the guidance of the district courts in their determination of the circumstances warranting exercise of the equitable powers of the court.

> In discussing these factors, we do not suggest that they impose a rigid or exhaustive checklist:."Rule 60(b)(6) is a grand reservoir of equitable power," *Harrell v. DCS Equip. Leasing Corp*., 951 F.2d 1453, 1458 (5th Cir. 1992) (internal footnote and quotation marks omitted), and it affords courts the discretion and power "to vacate judgments whenever such action is appropriate to accomplish justice." *Gonzalez*, 545 U.S. at 542 (*quoting Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)). However, we have "cautioned against the use of provisions of Rule 60(b) to circumvent the strong public interest in [the] timeliness and finality" of judgments. *Flores v. Arizona*, 516 F.3d 1140, 1163 (9th Cir. 2008). Given these important and potentially countervailing considerations, the exercise of a court's ample equitable power under Rule 60(b)(6) to reconsider its judgment "requires a showing of 'extraordinary circumstances.'" *Gonzalez*, 545 U.S. at 536. The factors we discuss below are designed to guide courts in determining whether such extraordinary circumstances have been demonstrated by an individual seeking relief under the rule.

Id. at 1135.

Respondent adopts these factors and asks this Court to apply them here. Petitioner does likewise, but argues below that the factors weigh strongly in favor of him in this motion. In addition, this Court should add the fact that this is a capital case, a matter not before the court in *Phelps*.

a. Intervening Change in the Law

Respondent grudgingly concedes that *Martinez* establishes the requisite change in the law. (Resp. Brief, p. 13.) As noted in his original motion, Petitioner set forth the large number of cases which have been remanded by the federal courts in light of *Martinez*. This factor is in Petitioner's

favor.

b. Exercise of Due Diligence

Respondent faults Petitioner for not raising this precise argument in the state or federal courts. Of course, any claim of ineffective assistance raised after the initial petition filed in 1986 would have been defaulted in the state courts, *see*, e.g., *Paz v. State*, 123 Idaho 758, 852 P.2d 1355 (1993), and Petitioner did raise claims of cause and prejudice in both the federal district court and on appeal.

Petitioner timely addressed the issues in his traverse filed in 1996 where Petitioner alleged that there was cause and prejudice for any default based upon the ineffective assistance of counsel at trial and on appeal. Dkt. 46, p. 3 Additionally, as to Claim 9 specifically, Petitioner alleged that this claim was "defaulted because of ineffective assistance of counsel on the consolidated appeal and post-conviction petition." Dkt. 46, p. 4.

In his Brief on procedural default filed in 1996, Petitioner argued "the cause as to these claims consists of the ineffective assistance of counsel at trial and on direct appeal afforded to the indigent petitioner." Dkt. 60, p. 24. Further, Petitioner argued that because of the consolidated nature of the post-conviction process in Idaho where a defendant must file his post-conviction petition within 42 days, before consideration of the direct appeal, and that petition and direct are consolidated before the Idaho Supreme Court, the Sixth Amendment should apply to post-conviction counsel. (Dkt. 60, p. 28.)

This Court rejected those arguments based on existing Ninth Circuit and Supreme Court law. (Dkt. 62, pp. 15-17.) On cross-appeal, based upon *Hoffman v. Arave*, 236 F.3d 523 (9th

Cir. 2001), Petitioner argued that he was entitled to address his ineffective assistance of counsel claims on the merits. Based on the then well-established law in the circuit, Petitioner did not renew his other arguments regarding procedural default. However, in his Petition for Rehearing, Petitioner requested the Ninth Circuit to reconsider its narrow reading of *Hoffman. See,* Dkt. 67, in 9th Circuit Case No. 01-99009.

Nor did Petitioner raise this issue in his Petitions for Certiorari, both filed before the Supreme Court decision in *Martinez*. Indeed, the sole question presented in the Martinez matter when it was accepted by the Court concerned only the question of whether a defendant had a "federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim." Supreme Court Docket No. 10-1001, Question Presented. In its decision issued in March 2012, the Supreme Court rejected the establishment of this federal constitutional right, but issued its ruling regarding the excuse for procedural default which is at issue here based upon the equitable nature of this relief. *Martinez*, 132 S.Ct. at 1318.

In *Lopez,* the Ninth Circuit found that the petitioner could have taken the same actions as Martinez did and this "weighs against his *reopening* Lopez's habeas case." 2012 WL 1676696, *5 (May 14, 2012) (emphasis added). However, the court noted

> We make clear that we do not fault Lopez for failing to raise his PCR counsel's ineffectiveness before the district court or before us in his original federal habeas proceedings. We agree with Lopez that imposing such a penalty would have the perverse effect of encouraging federal habeas lawyers to raise every conceivable (and not so conceivable) challenge--even those challenges squarely foreclosed by binding circuit and Supreme Court precedent. We do not believe that *Gonzalez* intended such an effect.

Id., n. 1.

As discussed more fully below, Lopez filed his Rule 60(b) motion five months after the conclusion of his habeas petition and after the mandate of the Ninth Circuit had issued. Because Leavitt's case was still pending when *Martinez* was decided, this factor should weigh in his favor.

c. Finality

Respondent's argument here is disingenuous at best and a distortion of the record. The present 60(b) motion was filed *before* the mandate issued and *before* the State sought a death warrant, setting a date before the federal courts had time to act on Petitioner's motion. In contrast, the mandate in *Lopez* issued from the Ninth Circuit on November 17, 2011. Over a month later, on December 29, 2011, the State moved the Arizona Supreme Court to set an execution date and the court set the date for May 16, 2012, before Lopez filed his Rule 60(b) motion.

In contrast, here, the State rushed to seek a death warrant in the state court, knowing that a Rule 60(b) motion was pending before this Court.[7] Respondent cannot establish his own time schedule and then argue that the factor of finality weighs in his favor. Because Petitioner filed his motion before any execution date was set and because under the local rules a stay should be in place, this factor weighs in Petitioner's favor.

d. Delay Between Judgment and Motion

Respondent concedes this factor weighs in Petitioner's favor.

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[7]As of January 1, 2012, the Idaho statutes regarding the setting of execution dates require that the state apply for a warrant, but there is no date within which that warrant must be sought by the state. *See*, I.C. § 19-2715.

e. Connection Between Leavitt's case and *Martinez*

Contrary to Respondent's argument, Petitioner's motion is in full accord with *Martinez*. This Court previously ruled that his claims were procedurally defaulted on the basis of law which has since been changed by the Supreme Court. Respondent's reliance on § 2254(e)(2), discussed in *Lopez*, must be rejected because this Petition was filed in 1993 and is controlled by pre-AEDPA law.[8]

f. Comity

As set forth below, Petitioner concedes that some of the sub-claims set forth in Claim 9 of his petition were addressed by the Ninth Circuit on the merits. As to these claims, this court might weigh this factor against him; however, neither this court nor the appellate court reached the merits of the significant substantive claims discussed below. Thus, while this factor weighs both for and against consideration of the motion, it is the sole one of the six that does.

g. This is a Capital Case

Because this is a capital case, this Court should also weigh this factor in ultimately deciding whether to consider the merits of the motion. *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976). In addition, a habeas petitioner should have one full and fair opportunity to litigate the substance of his claims in federal court. *See, e.g. Slack v. McDaniel*, 529 U.S. 473 (2000) and *Magwood v. Patterson*, __ U.S. __, 130 S.Ct. 2788 (2010).

Given the overwhelming factors in favor of consideration of the motion, this Court must

[8]Lopez filed his petition in 1998 after the enactment of AEPDA.

apply these factors and consider the merits of the Rule 60(b) motion.

5. *Idaho Capital Cases are Controlled by* Martinez

Citing two non-capital cases[9] and failing to reference the special appellate procedures in Idaho capital cases, Respondent claims that Idaho does not fall under the *Martinez* holding because ineffective assistance of counsel claims can be raised on "appeal." But I.C. § 19-2719 controls the entire review process in capital cases. This statute requires that all claims, including ineffective assistance of trial counsel claims, be raised *before* the appeal and within 42 days of the judgment imposing death. As the State has argued in almost every case, the Idaho courts treat this requirement strictly and any claim not raised according to that statute is routinely dismissed on procedural grounds in Idaho. *See*, e.g., *State v. Rhoades*, 820 P.2d 665, 677 (Idaho1991); *Fetterly v. State*, 825 P.2d 1073, 1075 (Idaho 1991), and *Paz v. State*, 852 P.2d 1355, 1356-57 (Idaho 1991). Leavitt's state court post-conviction petition was his only avenue for review of ineffective assistance of counsel claims.

Thus, this Court must reject this argument.

6. *Resolution of this Motion is not Controlled by* Edwards v. Carpenter

Respondent makes a circular argument impliedly rejected by the Supreme Court in *Martinez* that post-conviction ineffectiveness must itself be an independent claim in order to provide cause for any default, citing *Edwards v. Carpenter*, 529 U.S. 445, 451 (2000). (Resp. Brief, p. 17.) But since there has never been a Sixth Amendment right to effective assistance of

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[9] *State v. Mitchell*, 859 P.2d 972 (Idaho Ct. App. 1993) involves an attempted murder case and *State v. Darbin*, 708 P.2d 921 (Idaho Ct. App. 1985) involves a grand theft case.

post-conviction counsel and the Supreme Court rejected that proposition again in *Martinez*, 132 S.Ct, at 1315, the Supreme Court established an equitable rule to permit ineffective assistance of post-conviction counsel to be considered a basis for cause in federal habeas proceeding. It is hard to conceive that the Supreme Court, which remanded *Martinez* to the federal district court to review the issue of cause, would not have rejected the illogical argument put forth by Respondent, without the necessity of addressing it.

To provide an equitable remedy on the one hand and then deny that equitable remedy on the other makes no sense, and Respondent cites no case decided post-*Martinez* to support the argument. Therefore, Petitioner here, like the petitioner in *Martinez,* can assert post-conviction counsel's ineffectiveness as basis for cause even though it was not exhausted in state court because it is not an independent constitutional claim for relief.

7. *Claim 9 Presents Substantial Claims of Ineffective Assistance of Counsel*

a. The Failure to Challenge the Serology Evidence[10]

Trial counsel moved pre-trial to exclude the state's blood test results because of improper handling and preservation of the evidence. The trial court heard this motion on July 15, 1985, almost two months *before* trial counsel received the report of Dr. Blake, which was dated September 5, 1985. Trial began on September 12, 1985, a week after Dr. Blake's report was sent to counsel.

At the pre-trial motion, trial counsel did not present any witnesses, *see* Pre-trial Transcript,

[10]Petitioner concedes that the other part of this claim regarding the decision to call other witnesses does not meet the standard set forth in *Martinez*.

hereinafter "Ptr.," pp. 301-309. Mr. Hart, one of Leavitt's trial counsel, presented the motion to the court and made comments about conversations with the expert, including suggesting an (apparently informed) discussion between the expert and the trial judge. Ptr., pp. 301-302. Upon the conclusion of oral argument, the trial court denied the motion from the bench. Ptr. p. 308.

At trial, the State presented the testimony of Ann Bradley (Trial Transcript (Tr.) at pp. 1315-90), including her testimony about the mixing of Leavitt's and Elg's blood on a pair of shorts. Tr., p. 1350. In closing argument, the prosecutor used this testimony as proof that Leavitt's blood was deposited in the room at the time of the killing, thereby refuting his testimony that he had a nose bleed at an earlier time. Tr. p. 2222. Trial counsel did not seek to refute this critical piece of evidence with testimony from Dr. Blake, who noted in his report that the two samples could have been deposited separately rather than being "mixed" as the prosecution argued.

Within 42 days of the judgment, a post-conviction action was filed by attorney Thomas Packer. The petition alleged that "Petitioner was denied the effective assistance of counsel." No specific instances of ineffective assistance of counsel were alleged. The only subsequent filing by new post-conviction counsel, David Parmenter, was a motion for enlargement of time to conduct a hearing on the petition, dated February 5, 1987. The hearing was then held on April 23, 1987.

Post-conviction counsel did not call Dr. Blake as a witness regarding the blood evidence. The State called trial counsel Jay Kohler, but did not call Ron Hart, the trial counsel who had conducted the pre-trial hearing to exclude the evidence. Kohler erroneously testified regarding the in limine motion, stating, "Of course, that motion was heard prior to trial and denied, but we used

his report as a basis for that motion." Transcript of Post-Conviction Hearing, hereinafter, "PcTr," p. 155. Petitioner's counsel did not challenge Kohler on this critical error.

In response to the State's questioning, Kohler stated that his decision not to use Dr. Blake was made because "we simply felt that he really had nothing to offer as far as rebutting the testimony of Ann Bradley." PcTr, p. 154. Yet, on cross-examination, Kohler could not remember Dr. Blake's testing of the shorts even though Kohler believed that the shorts were "one of the most incriminating items of evidence, in our opinion." PcTr, p. 164. And he could not recall discussing the shorts specifically with Dr. Blake. PcTr. p. 167, 169.

At the conclusion of the post-conviction hearing, Parmenter stated in closing argument,

> No. 1, the Petitioner feels that it would be crucial, and was crucial to have Dr. Blake's testimony. . . We feel that there is enough raised by the report that would have made that evidence very permanent, very crucial.

PcTr., p. 175. But Parmenter failed to call Dr. Blake in the post-conviction hearing to explain the significance of the evidence. There was no excuse for his failure to call Dr. Blake at this hearing.[11]

This is a pre-AEDPA case so there is no deference provided the state court's legal ruling; moreover, the failure of post-conviction counsel to develop the claim allows this Court to make its own factual findings. Because the evidence regarding the shorts was the sole item on which the state based its argument that Leavitt deposited the blood at the time of the killing, this evidence

[11]To the extent that the Ninth Circuit believed that the claim would be denied on the merits, that can only be based upon the failures of post-conviction counsel to effectively represent Leavitt in those proceedings.

was key to the case.

Respondent's argument that this Court denied the merits of this claim is unsupported. Because this Court improperly dismissed this claim on procedural default grounds, it must now re-examine this claim in light of *Martinez*. It is a substantial claim and one that post-conviction counsel failed to develop. Moreover, there is a reasonable probability that had the claim been developed there would have been a different result at trial. Assuming that there was no mixture of the blood as testified to by Bradley and argued by the State, the sole piece of circumstantial evidence tending to prove that Leavitt was at Elg's house at the time of the killing would be refuted. The jury would then have evidence to support Leavitt's testimony both about his nose bleed prior to Elg's death and his testimony about how he cut his finger.

Respondent argues in passing that the claim in the petition is conclusory, an argument not previously raised before this Court. Resp. Brief, p. 27. Neither Respondent nor this Court can have any doubt about the substance of this claim given the extensive history of this case. Petitioner was prejudiced by his counsels' failures to effectively arguing against the State's claim that the forensic blood evidence proved that Petitioner committed the murder. Petitioner should have the opportunity to present this critical issue in one evidentiary hearing where post-conviction counsel, trial counsel and the expert would testify. By failing to conduct that hearing now, Petitioner is denied his right to one fair and full consideration of his first and only federal habeas petition.

For these reasons, the Court should set this matter for an evidentiary hearing on this substantial claim of ineffective assistance of counsel.

b. The Failure to Object to Prosecutorial Misconduct

The failure of trial counsel to object to instances of prosecutorial misconduct, including the link in the chain argument which the Ninth Circuit found "just plain wrong" and "wholly undesirable," *Leavitt v. Arave*, 383 F.3d at 834, must be considered by this Court in its determination of *Strickland* error individually and cumulatively with the other counsel errors raised in the petition. While the Ninth Circuit held that standing alone, the improper argument did not warrant relief, this Court should not be barred from considering the effect of this error cumulatively in this Rule 60(b) motion. The same analysis should be applied to the prosecutor's comment on Leavitt's silence at the Magistrate's inquest when the prosecutor accused Petitioner of "hid[ing] behind Defense Counsel and the decisions of his attorneys ... . And it is the nature of the calling of defense attorneys to also protect boys and men when they get in trouble ... . He can't hide behind what others advised him to do ... ." (Tr. p. 2133.)

Respondent can point to no tactical or strategic reason for trial counsel's failure to object to this argument. The failure to object thus rises to the level of deficient performance. When this Court examines the prejudice from trial counsels' errors cumulatively, this "wrong" argument requires reversal under *Strickland*. When examined in light of the failure to investigate the serology evidence, which Respondent claims is strong evidence of guilt, and the failure to challenge the jury instructions, including incorrect alibi and presumption of innocence instructions, full consideration of these claims is warranted given the "grand reservoir of equitable power" under Rule 60(b). *See*, *Phelps,* 569 F.3d at 1135 (citations omitted).

c. Trial counsel failed to seek the exclusion of evidence that Petitioner possessed a knife while engaging in consensual sexual intercourse with a woman

At trial defense counsel failed to object to the cross-examination testimony of a woman named Barbie Rich who admitted to having an affair with Mr. Leavitt and was permitted to testify that he displayed a knife while they were engaging in consensual sexual intercourse. This inadmissible character evidence was offered for the sole purpose of portraying Mr. Leavitt as a depraved, sexual deviant-adulterer obsessed with knives – it had no proper legal relevance to any contested issue in the case.

Its admission violated Mr. Leavitt's due process rights to a fair trial because there are simply "no permissible inferences" which can be drawn from the evidence. *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993), *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). This evidence is of such a nature that it could not help but inflame the passion and prejudice of the jury:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt.... The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

McKinney, 993 F.2d at 1384-85, quoting *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (footnotes omitted).

Trial counsel's failure to object to the evidence fell below an objectively reasonable

standard because it is manifestly harmful and fully objectionable, and no imaginable tactical purpose would justify non-objection. It is inescapable that the trial was impermissibly tainted by this emotionally charged character evidence, rendering it fundamentally unfair in violation of the due process clause. Viewed either individually, or in combination with the other failures of counsel alleged here, there was a reasonable probability of a different result had counsel tendered an appropriate objection.

d. Trial counsel failed to object to the giving of erroneous reasonable doubt and presumption of innocence instructions

Six of the 50 instructions given by the trial court addressed in various respects the concepts of the presumption of innocence and the requirement for proof beyond a reasonable doubt. Four were given before the evidence (Preliminary Instructions 10, 11, 12 and 13, R., pp. 770-73), and two at the end of the trial (Instructions 36, R., p. 797, and 39, R., p. 800). Considered individually and as a whole these six instructions essentially eliminated the presumption of innocence and the requirement for proof beyond a reasonable doubt.[12] The most

[12] Viewed as a whole, these instructions systematically made conditional, trivialized, mis-allocated, and finally extinguished altogether the requirement for proof beyond a reasonable doubt. Preliminary Instruction 10 referred to requiring reasonable doubt as something the jury "should" do. Subsequent instructions amounted to a laundry list of what is *not* reasonable doubt. It is not a possible doubt (Instruction 11), it is not designed to free a person who is "in fact guilty" (Instruction 12), it does not apply to "all the facts and circumstances in evidence" (Instruction 13), it is not a thing which arises from being overly sensitive about the consequences of a guilty verdict or engaging in trivial or fanciful suppositions (Instruction 36), and the jury is not to be particularly careful simply because of the oath or to "hunt up" doubts, *id.* The alibi instruction (Instruction 39) improperly placed the burden on Mr. Leavitt to establish a reasonable doubt as to his only defense, an allocation echoed by the concluding phrase of Instruction No. 36: "[a] doubt *to justify an acquittal* must be reasonable." (Emphasis added.) A reasonable jury would have understood that it should be much more reluctant to acquit than to convict.

destructive of them was Instruction 12, which stated:

> The rule of law which clothes every person accused of a crime with the presumption of innocence and imposes upon the State the burden of proving his guilt beyond a reasonable doubt, is not intended to aid anyone who *is in fact guilty* to escape, but is a humane provision of law, intended so far as human agencies can to guard against the danger of *an innocent person* being unjustly punished.

R., p. 772 (emphasis added).

Over the course of this litigation the parties have extensively addressed the question whether Instruction 12, by itself or in combination with the other reasonable doubt instructions, was erroneous, and whether it was an appropriate vehicle for relief in federal habeas corpus.[13] The issue presented here is related, but different – whether trial counsel for Mr. Leavitt provided ineffective assistance when they failed to object to Instruction No. 12.

There can be no question that this issue was appropriately raised in Claim 9 of Mr. Leavitt's First Amended Petition – paragraph 74 incorporates Claim 11 by reference, which in turn raises the failure *at trial* of the Court to instruct properly on the presumption of innocence and the requirement for proof beyond a reasonable doubt. In Petitioner's Traverse to Answer, at paragraph 4(h), p. 5, we specifically alleged as to this issue that "there was cause and prejudice in any procedural default because of *trial counsel* and appellate counsel's ineffective assistance of counsel ... ." (Emphasis added). No fair reading of the Amended Petition could conclude that this

[13] This Court's grant of the writ on this ground was later reversed by the Ninth Circuit in reliance on *Teague v. Lane,* 489 US 288 (1989), an argument the State raised for the first time on appeal. In essence, the Ninth Circuit held that Instruction 12 was erroneous, but that the standard for analyzing such an instruction was announced in *Cage v. Louisiana,* 498 U.S. 39 (1990), a case allegedly decided after Mr. Leavitt's case became "final."

issue was not presented by Claim 9.

There also can be no question that Instruction 12 was an incorrect statement of the law. Both this Court and the Ninth Circuit have so held in this case. Instruction 12 directs the jury that the requirement for proof beyond a reasonable doubt and the presumption of innocence simply *do not apply at all* if the defendant is guilty "in fact." This is particularly egregious where, as in this case, the jury is also instructed that the "facts" in the case need not be proved beyond a reasonable doubt (Instruction 13). Almost thirty years before the trial in this case, in *Reynolds v. United States*, 238 F.2d 460 (9th Cir. 1956), the Ninth Circuit had reversed a manslaughter conviction because of an instruction nearly identical to Instruction 12. *See also United States v. Shaw*, 244 F.2d 930, 938 (9th Cir. 1957) (no retreat from *Reynolds*); *Gomila v. United States*, 146 F.2d 372 (5th Cir. 1944) (similar instruction "is not a correct statement of the law"); *United States v. Bridges*, 499 F.2d 176, 186 (7th Cir.), *cert. denied*, 419 U.S. 1010 (1974) (same).

In considering this claim, the Court ultimately must determine whether, in light of all the circumstances, counsel's performance was deficient and whether the deficient performance prejudiced Mr. Leavitt. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, Mr. Leavitt must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id*., 466 U.S. at 688. To establish prejudice, a "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." *Id*., at 694.

Acquiescing in the giving of Instruction No. 12 fell below an objective standard of

reasonableness because the instruction is plainly erroneous. No tactical reason has ever been claimed, or for that matter is imaginable, for permitting this instruction to go unchallenged.

There is also a reasonable probability, sufficient to undermine confidence in the outcome, that but for counsel's unprofessional errors, the result of the proceeding would have been different. This was truly a reasonable doubt case. The state's case was entirely circumstantial. Mr. Leavitt never confessed, but rather maintained his innocence throughout. It was critical to his defense that he be accorded every bit of persuasive force which the presumption of innocence and the requirement for proof beyond a reasonable doubt provided. Far from doing so, however, Instruction No. 12 critically weakened both protections. Had counsel objected to Instruction No. 12, conducted minimal research, and presented argument to the trial court, the instruction would have been excluded and the jury would have been properly instructed on these bedrock provisions of law. Had that occurred, there is a reasonable probability that Mr. Leavitt would have been found not guilty. At the very least, this undermines confidence in the outcome.

8. *Conclusion*

For all these reasons, the Court should issue a stay of Mr. Leavitt's execution, and set the matter for a hearing on the motion for relief pursuant to F.R.Civ.P. 60(b).

DATED this 29th day of May, 2012.

/s/
David Z. Nevin
Andrew Parnes

CERTIFICATE OF SERVICE

I hereby certify that on this 29TH day of May, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/
David Z. Nevin