NO. 12-35450

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD A. LEAVITT, Petitioner-Appellant, vs. A.J. ARAVE, Respondent-Appellee.	)	DISTRICT COURT NO. CV-93-24-BLW DISTRICT OF IDAHO BOISE

OPENING BRIEF OF THE APPELLANT AND REQUEST FOR STAY OF EXECUTION

On appeal from the United States District Court for the District of Idaho the Honorable B. Lynn Winmill, United States District Judge, presiding.

David Z. Nevin
NEVIN, BENJAMIN, McKAY
& BARTLETT LLP
P.O. Box 2772
Boise, ID 83701
208-343-1000

Andrew Parnes
671 N. 1st Avenue
Ketchum, ID 83340
208-726-1010

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

1. *Introduction*

Consistent with the Court's Order of June 1, 2012, this Opening Brief will be "abbreviated ..., focused upon the correctness of the district court's June 1, 2012 order."[1] In the district court counsel argued that four instances of post-conviction counsel's failure to raise and pursue the ineffectiveness of trial counsel prejudiced Petitioner, requiring a hearing before the district court.

2. *Standard of Review*

This Court reviews the denial of Rule 60(b) motion for an abuse of discretion. *Delay v. Gordon*, 475 F.3d 1039, 1043 (9th Cir. 2007). In this case, the district court abused its discretion both in the procedures applied to this case as well as the consideration of the merits. First, the district court improperly decided the merits of the case without providing Mr. Leavitt an opportunity to develop the record. As this Court noted in *Sexton v. Cozner,* 2012 WL 1760304, *9, "[t]here may be cases where the record is devoid of sufficient information necessary to evaluate whether PCR counsel was ineffective, and as a result, remand under *Martinez* would be necessary. However, due to the extensive record already

---

[1] In particular, we will not address the district court's finding that the "*Martinez* Exception" applies to Idaho capital cases, Memorandum Decision and Order, June 1, 2012 (hereafter June 1 Order), at pp. 16-18, or that a *Martinez* claim is not required by *Edwards v. Carpenter,* 529 U.S. 446 (2000), to be exhausted, June 1 Order at pp. 18-19.

before us, that is not the case here."

In contrast, as discussed below in detail, the district court abused its discretion by making speculative conclusions about the performance of both PCR and trial counsel. Reliance is placed on two lines in a state court transcript that decisions of trial counsel were strategic. Yet, when the record which currently exists is examined, even that claim is unsupported.

Once the district court concluded that Mr. Leavitt was entitled to have the court reach the merits of the 60(b) motion applying the factors in *Phelps*, the district court erred in not permitting him to develop the claims fully, instead relying on an incomplete record, prohibiting due consideration of the merits of the underlying ineffective assistance of PCR and trial counsel. In this capital case, this Court should reverse the denial of the Rule 60(b) with directions to the district court to permit discovery and development of the claims which were procedurally defaulted in 1996.

3. *Post-conviction and trial counsel provided ineffective assistance regarding the serology evidence.*

A. Deficient performance.

The district court correctly observed that "this is not a case in which post-conviction counsel wholly failed to raise any claims of ineffective assistance of

trial counsel." June 1 Order, p. 20. The Petition for Post Conviction Relief, filed in the trial court on February 19, 1986, indeed alleged that "Petitioner was denied effective assistance of counsel," *id*, paragraph 7(c), p. 2. Post conviction counsel David Parmenter also touched on ineffective assistance at the post-conviction hearing by calling Mr. Leavitt and his mother to testify. Tr. pp. 42-64 and 72-129, ER 437-455, and 463-520. It is also correct that trial counsel Mr. Kohler was called by the State and testified that he had concluded that the testimony of a defense expert, Dr. Edward Blake, would only have served to corroborate the testimony of Ms. Bradley, the State's serology expert, and that he therefore made a strategic decision not to call him. June 1 Order at 21, ER 22. This being so, the district court concluded that the 60(b) motion failed to "overcome the presumption that Parmenter made reasonable strategic decisions as to which claims of ineffectiveness to raise and which claims to discard." *Id.* p. 22, ER 23.

The district court's ruling is incorrect because the record reveals that in fact Parmenter abandoned this important claim of ineffectiveness for absolutely no reason at all, much less a strategic reason. In this it is important to appreciate the distinction between testimony of the experts as to where blood was located and the nature of its typing, on the one hand; and on the question whether the blood was "mixed," on the other. The bulk of Ms. Bradley's testimony was focused on the

former point – the mechanical process of placing the blood evidence at he crime scene. At p. 1350 of the trial transcript, however, Ms. Bradley made the remark that there "could even have been a mixture of blood types themselves." ER 606.

Meanwhile, Dr. Blake's report had unequivocally referred to the two samples of blood as "underlaying or overlaying each other," not as mixed. This is a powerful distinction. The implication of "mixture" is of course that the two blood types were both liquid at the same time, and hence able to be mixed. The implication of under or over-laying is that the two types of blood were not deposited "contemporaneously," but rather at two separate times.

The proposition that Parmenter made a tactical decision to abandon this issue is belied by the record. On the contrary, he cross-examined Kohler about the issue at the post-conviction hearing, but did not offer the testimony of Dr. Blake. Parmenter asked Kohler, "regarding the shorts, or the parts that I referred you to, did he [Blake] make any reference of one type of blood overlaying or underlying another type of blood?" Tr., p. 165, ls. 21-3, ER 553. After an objection and colloquy, Mr. Kohler read from the report, "[w]ell, his report says, 'A weak A antigen may result from thin smears of A blood overlying the type O blood.'" *id.*, pp. 166-67, ER 554-5. Kohler did not recall discussing this with Dr. Blake, but "we did review his entire report with him. I assume that we did," *id., p.* 167, ls. 5-

7, ER 555. Parmenter goes on to point to the "closing statement by the Prosecution that the blood or whatever had to become fixed together on those shorts." *Id.,* p. 168, ls. 12-14, ER 556, and asks Kohler, "[d]o you not feel it would have been helpful to have Dr. Blake perhaps bolster the defense by showing that the one may have overlaid or underlaid the other, as indicated in his report?" *Id.,* p. 168, ls. 18-21, ER 556. At this point, Kohler says "I'm not sure I follow what you are getting at Mr. Parmenter," *id.,* ls. 22-23, after which Parmenter elicits additional testimony about counsel discussing the report with Dr. Blake, but does not return to the mixing issue.

Plainly, Parmenter was aware of this issue, and at least thought it important enough to question Kohler over it. And plainly nothing in Kohler's testimony changed this opinion – in Parmenter's brief (2½ page) closing argument he argued that"it would be crucial, and was crucial, to have Dr. Blake's testimony. I think that evidence and testimony would have been compelling ... ." 175, ls. 5-8, ER 563. The trial Court's decision denying post-conviction relief gives no hint that it was even aware of the mixing issue. The court simply concluded that "it was apparently decided by defense counsel that strategically Dr. Blake's testimony would corroborate [the State's expert's] testimony to the extent that the discrepancies would be minimal." Memorandum Decision, filed May 1, 1987, p.

5. All that can be deduced from the record from here is that Parmenter did not seek reconsideration or otherwise re-open the record to present Dr. Blake's testimony, and did not raise this issue on appeal.

At the very least this overcomes any presumption that Parmenter's abandonment of this issue was a "tactical or strategic choice[] after an adequate inquiry into the facts and law," and therefore "virtually unchallengeable under *Strickland,*" June 1 Order, p. 20, ER 21, *citing Gerlaugh v. Stewart*, 129 F. 3d 1029, 1033 (9th Cir. 1997). On the contrary there is every reason to conclude that Parmenter simply stumbled in a haphazard fashion through the issues, taking them up and abandoning them willy nilly. There was no reason for Parmenter to raise the issue at all if he did not see it as meritorious. There is nothing about Kohler's non-responsive testimony on the mixing subject which suggests that Parmenter saw himself on the brink of danger and decided on the spot to drop the issue – by the time of the closing argument he still saw it as "crucial." And nothing but purest speculation could support the proposition that there was a strategic purpose in not raising it on appeal.

The district court also considered footnote 40 of this Court's decision in *Leavitt v. Arave*, 383 F. 3d 809, 840, n. 40 (9th Cir. 2004) to be law of the case and thus binding. Whatever the application of the law of the case doctrine to the

district, it is clear that it applies differently to this Court.

> "The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996). However, an appellate court is not required to follow the law of the case; whether to do so is discretionary. *United States v. Lewis*, 611 F.3d 1172, 1179 (9th Cir. 2010) (citing *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152 (1912). According to the doctrine, however, a prior decision should be followed unless (1) the decision is clearly erroneous and its enforcement would work a manifest injustice; (2) intervening controlling authority makes reconsideration appropriate; or (3) substantially different evidence was adduced at a subsequent trial. *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995).

Alaimalo v. United States, 645 F.3d 1042, 1049 (9th Cir. 2011).

Footnote 40 should not be seen as resolving this issue because it is plainly erroneous. The blood mixing issue – indeed any argument regarding the serology evidence at all – was not raised at the Idaho Supreme Court, and therefore was procedurally defaulted. *O'Sullivan v. Boerckle,* 526 U.S. 838 (1999). Thus this Court was simply wrong when it held, without giving counsel an opportunity to address this issue in the district court, that it "was actually considered and rejected on the merits in state court," and therefore was "not procedurally defaulted."[2] Finally, there is no support in the record for the proposition that *the mixing issue* is

---

[2] In any event, the petition in this case 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.

simply a matter of "a defendant's disagreement with his trial counsel's tactical decisions ... ." *Id.* Parmenter did not adequately present this issue for resolution by the state trial court. He did not appeal it to the Idaho Supreme Court. As a result, when the Idaho Supreme Court, having "reviewed the record as a whole," found no error because "it is clear that in the exercise of trial strategy, defense counsel did not always follow defendant's requests," *State v. Leavitt*, 775 P. 2d 599, 605 (Idaho 1989), it cannot have been referring to the mixture issue, because that issue was not before it. Furthermore, Leavitt never testified at the PCR hearing that he had asked for Blake to testify, but counsel had refused.

B. Prejudice

The district court also erred in assessing the critical significance of a supposed mixing of the two blood types. It is hardly possible to deny the persuasive force of the mixing argument, which is confirmed by its prominence in the prosecutor's closing argument at trial – at the very end, coming before only the link-in-the-chain argument. As the prosecutor put it, "this is the conclusive proof of the case." Tr. P. 2221, ER 573. What's more the state and federal courts, including this Court in earlier appeals, have repeatedly referred to it in characterizing the evidence against Mr. Leavitt as powerful. As the Idaho Supreme Court put it, "The victim's blood was type A, and tests of the blood

samples from the crime scene reveal that type O blood had been deposited contemporaneously with that of the victim's type A blood. . . . No explanation could be offered as to how his blood became mixed with that of the victim." *State v. Leavitt*, 775 P.2d 599, 601-602 (Idaho 1989), ER 339-40. Judge Winmill also referred to the fact that "two different blood types were present at the scene of the murder and had been deposited contemporaneously: type A, belonging to Ms. Elg, and type O." *Leavitt v. Arave*, Memorandum Decision and Order on Petition for Writ of Habeas Corpus, September 6, 2000 (Dkt. 120), p. 6, ER 44. *See also, id.,* p. 33, ER 71, (two types of blood "deposited contemporaneously"); p. 67, ER 105, ("[a]t trial, the prosecution *focused on* evidence that petitioner's blood, *mixed with Ms. Elg's blood*, had been found at the murder scene, and that the petitioner had sustained a severe cut to his finger at or around the time of Ms. Elg's death" (emphasis added)); *See also Leavitt v. Aravae,* Docket No. 141, pp. 3-6 (denying motion to alter or amend in part because blood was mixed). This Court also referred to the mixing prominently, *See Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004) at pp. 815 ("The killer was also wounded and left behind his blood – type O which was mixed with the blood of his hapless victim – Type A."); 823 ("Most damning of all, Leavitt's blood was mixed with the victim's blood, for which there is no rational explanation other than that he was there when she spilt it."); 833

("And his blood was mixed with Elg's in her room."

Rather the district court concluded that "Leavitt appears to overstate the significance of Blake's opinion about the lack of "mixing ... on one piece of clothing." June 1 Order, p. 29, ER 30. But the thrust of the prosecution's argument was focused strongly on the express concept of "mixing," and the inescapable conclusion which seemed to flow from that fact:

> [t]here were two bloods mixed together in one spot. How do you get two bloods mixed together in one spot when the victim – when the Defendant claims he bled a week earlier in her room ... ? How did you get these two bloods mingled together unless they were deposited there at the same time? When that A type blood got on her, the O type blood got on her. It's all part of the same transaction. There were not two separate incidents of bleeding in that room. There was one.

Tr., p. 2222, ER 574. Indeed, if the blood both of Mr. Leavitt and Ms. Elg had been deposited during the murder they would necessarily have been "mixed," and it was precisely this inference which the prosecutor and the Courts have repeatedly relied upon. If instead the two types of blood were in a configuration of being underlaid or overlaid they necessarily were not laid down, to quote the prosecutor, "at the same time." It is precisely this type of evidence that Petitioner is entitled to have adequate time and resources to develop fully, rather than having it resolved in summary fashion on the merits.

The district court also rejected Petitioner's argument that the supposed mixing of blood on the shorts was the only evidence offered to show that the two types of blood were deposited at the same time, pointing to the cut to Leavitt's finger and his shifting versions about the source of that cut. June 1 Order, p. 29. However, the finger cut and the changing stories only made it *possible* that Leavitt's blood was deposited at the time of the killing – it did not make it *definite*. Only the supposed "mixture" of the blood had that effect.

4. *The Reasonable Doubt and Presumption of Innocence Instructions*

The district court first concludes that "a stand-alone Sixth Amendment trial counsel claim" on the basis of a failure to object to the giving of erroneous reasonable doubt and presumption of innocence instructions "has never been raised. Leavitt's attempt to broaden the scope of Claim 9 to include such a claim now is equivalent of a late substantive amendment to the Petition," and may not be considered now. June 1 Order, p. 34, ER 35.

But no fair reading of the Amended Petition could conclude that this issue was not presented by Claim 9 – paragraph 74 of the amended Petition 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. And Petitioner's Traverse to Answer, at paragraph

4(h), p. 5, 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), ER 232.

The matter is certainly not law of the case in the district court, as the June 1 Order seems to imply at pp. 33-4, ER 34-5, referring to the Court's Memorandum Decision and Order, filed October 22, 1996 (Dkt. 62), pp. 15-16, ER 178-9. In that Order the district court limited the claim of ineffectiveness of appellate counsel to a failure to challenge the jury instructions, and rejected (in footnote 7) Petitioner's effort to reserve other bases for arguing ineffectiveness of appellate counsel. But while ¶74 presents the issue of appellate counsel's failure regarding instructions, it *also* presents trial counsel's failure, and Docket 62 does not hold to the contrary. Since we did not, and do not, read the district court to be holding that ¶ 74 referred *only* to appellate counsel, counsel had no occasion to argue this issue on reconsideration.

Claim 11 is indeed a direct attack on the reasonable doubt instructions, June 1 Order at 34, ER 35, but in ¶ 4(h) of the Traverse Petitioner made it clear that any procedural default of the issue in the state courts was excused by cause and prejudice "because of trial counsel and appellate counsel's ineffective assistance of counsel ... ."

For all these reasons, the district court was therefore in error when it held that the present motion is an attempt to broaden the scope of Claim 9, and is the equivalent of a late substantive amendment to the Petition .

The district court went on to hold, however, that the jury instruction issue "otherwise lacks substantial merit," because the Ninth Circuit has already "passed judgment" on these instructions, in this case, *Leavitt v. Arave*, 383 F. 3d 809, 818-23 (9th Cir. 2004), and in *Rhoades v. Henry*, 638 F. 3d 1027 (9th Cir. 2011), June 1 Order, pp. 34-5, ER 35-6. Neither assertion is correct.

Before explaining why, we again direct the Court's attention to the instructions themselves. Considered individually and as a whole the six reasonable doubt and presumption of innocence instructions essentially eliminated the presumption of innocence and the requirement for proof beyond a reasonable doubt.[3] The most destructive of them was Instruction 12, which stated:

---

[3] 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, ER 655, 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) ER 656, it is not designed to free a person who is "in fact guilty" (Instruction 12) ER 657, it does not apply to "all the facts and circumstances in evidence" (Instruction 13) ER 658, 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) ER 682, and the jury is not to be particularly careful simply because of the oath or to "hunt up" doubts, *id.* The

> 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, ER 657 (emphasis added).

There also can be no question that Instruction 12 was an incorrect statement of the law. Both *Leavitt* and *Rhoades* so hold. 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

---

alibi instruction (Instruction 39) ER 685 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.

statement of the law"); *United States v. Bridges*, 499 F.2d 176, 186 (7th Cir.), *cert. denied*, 419 U.S. 1010 (1974) (same).

In its earlier decision in this case, the panel may have "betrayed its skepticism" on this point, June 1 Order, p. 34, ER 35, but it decided the case on another ground – namely that granting the relief to Mr. Leavitt gave him the benefit of a new rule, forbidden by *Teague*. That being so, the panel's comments on the effect of the reasonable doubt and presumption of innocence instructions is dicta, not binding on the district court or this Court.

In *Rhoades*, the Court again found an instruction similar to Instruction 12 to be erroneous, but it held that in the context of the other instructions in that case the jury was adequately apprised of the obligation to apply the requirement for proof beyond a reasonable doubt. This Court is not bound by *Rhoades* for several reasons. The *Rhoades* opinion does not reveal exactly what instructions were being considered in the case, or how they would compare to the instructions in this case. At least one thing is certain – unlike the present case, *Rhoades* did not involve an erroneous alibi instruction, which this Court in Mr. Leavitt's case said was "clearly wrong." 383 F. 3d at 822-23.

Furthermore, it is not clear that Rhoades fully presented the argument that the "proof of facts" instruction violated *Winship* – the panel stated that Rhoades

"fails to develop any argument why it does," and went on to hold that "[i]t doesn't, as we held in *Leavitt*, 383 F.3d at 822 (explaining that 'the prosecution need not prove every fact in the case beyond a reasonable doubt so long as it proves every element beyond a reasonable doubt'"). As we note above, the decision in *Leavitt* was dicta, since the jury instruction issue there was decided on *Teague* grounds. In any event, *Leavitt* simply cited *Harris v. United* States, 536 U.S. 545, 549 (2002) for this proposition – but *Harris* did not involve an instruction like No. 12, which provided that the presumption of innocence and the burden of proof beyond a reasonable doubt did not apply to a person who was guilty "in fact." Instructing the jury in such a context that the "facts" in the case need not be proved beyond a reasonable doubt struck a double blow to these bedrock protections of the American criminal justice system.

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. Acquiescing in the giving of these instructions, particularly Instruction No. 12, "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). 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 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. Mr. Leavitt's 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 conducted minimal research, objected to Instruction No. 12, 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.

5. *The failure to object to prosecutorial misconduct and to seek the exclusion of evidence that Petitioner possessed a knife while engaging in consensual sexual intercourse with a woman.*

The district court rejected Petitioner's arguments that failure of trial counsel to object to instances of prosecutorial misconduct and to evidence of Mr. Leavitt displaying a knife during a sexual encounter, contributed to his claim of

ineffective assitance of counsel.

The prosecutorial misconduct included making 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, which should be considered in the determination of *Strickland* error individually and cumulatively with the other counsel errors raised in the petition. 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.)

There is simply no tactical or strategic reason for trial counsel's failure to object to these instances of prosecutorial misconduct. 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).

Similarly, at trial defense counsel failed to object to the cross-examination testimony of a woman named Barbara Rich who admitted to having an affair with Mr. Leavitt and was testified that he displayed a knife while they were engaging in consensual sexual intercourse. The district court ruled that this Court previously decided that this testimony was actually admissible, June 1 Order, pp. 31-2, ER 32-3. In fact, this Court did not go that far, articulating that the argument that it might have been admissible to rebut the claim of cooperation or to suggest that the missing knife was the murder weapon. But it added, "[s]till and all, the connection was pretty thin." 383 F.3d at 829. In fact, Ms. Rich's testimony amounted to inadmissible character evidence, offered for the sole purpose of portraying Mr. Leavitt as an adulterer who was obsessed with knives and sex – it had no proper legal relevance to any contested issue in the case.

The evidence was also 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. The *Leavitt* panel found that the evidence harmless, but we respectfully suggest that this Court should consider its impact in conjunction with the other instances of ineffective assistance presented here.

6. *Conclusion*

For all these reasons, the Court should issue a stay of Mr. Leavitt's execution, and remand the case to the district court for a full evidentiary hearing on the substantive claims of ineffective assistance of counsel presented by the motion for relief pursuant to F.R.Civ.P. 60(b).

DATED this 3rd day of June, 2012.

David Z. Nevin
Andrew Parnes

CERTIFICATION PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Ninth Circuit Rule 32-1 and Fed. R. App. P. 32(a)(7)(c), I certify that the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 5149 words.

Dated: June 3, 2012.

David Z. Nevin

STATEMENT OF RELATED CASE PURSUANT TO CIRCUIT RULE 28-2.6

Pursuant to Ninth Circuit Rule 28-2.6, the case of Leavitt v. Arave, No. 12-35427 is a related case as it arose out of the same case in the district court.

Dated: June 3, 2012.

David Z. Nevin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 3rd day of June, 2012, I caused a true and correct copy of the foregoing reply brief to be served on LaMont Anderson, Deputy Attorney General, State of Idaho, by electronic court filing.

David Z. Nevin