1 **IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO**

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RICHARD LEAVITT,                       : Case No. 1:93-cv-24-BLW
                                       :
                    Petitioner,        :   MOTION HEARING
                                       :
            vs.                        :
                                       :
A.J. ARAVE,                            :
                                       :
                    Respondent.        :
                                       :
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14 **REPORTER'S TRANSCRIPT OF PROCEEDINGS**

15 before B. Lynn Winmill, Chief District Judge

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18 June 1, 2012

19 Pages 1 to 67

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1 **I N D E X**

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3 **Date** **Proceeding** **Page**

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1 P R O C E E D I N G S
2 June 1, 2012
3 THE CLERK: The court will now hear the
4 video motion hearing in Case No. 93-024, Leavitt
5 versus Arave.
6 THE COURT: Good morning, Counsel. Give me
7 just a moment.
8 Ms. Fulwyler, is this monitor -- it
9 isn't on. All right. There. I'm fine.
10 Counsel, give me just a moment to log
11 on so I can access my notes.
12 All right. As Ms. Fulwyler indicated,
13 this is a matter before the court on the motion
14 filed by the petitioner for reconsideration under
15 Rule 60(b) of the court's earlier decisions
16 concerning whether or not certain claims of
17 ineffective assistance of trial counsel was
18 procedurally defaulted and also a request for a
19 stay of the execution scheduled now for, I think,
20 what, 12 days from now.
21 I have reviewed the briefing that has
22 been submitted. Mr. Nevin or Mr. Parnes, you're
23 the moving party. I'm probably not going to ask
24 as many questions as I normally would because this
25 is a video conference hearing, and it's rather

1 hard to make inquiry. I may have questions at the
2 end more than during the argument itself, but I
3 think we'll just proceed, and I'll just hear the
4 oral argument of counsel.
5 MR. PARNES: Good morning, Your Honor.
6 Andrew Parnes on behalf of Mr. Leavitt.
7 Your Honor, I would like to just
8 briefly address, because I think they were
9 addressed in the briefs, the issues that bring
10 this matter properly before the court. And when
11 you look at the issues that are set forth in
12 Phelps, I think we have set forth the factors that
13 show that we're properly before the court. I
14 don't intend to repeat those. If the court has
15 questions about those, I will certainly address
16 them.
17 But I think that, in addition to the
18 six factors in Phelps, the fact that this is a
19 capital case should weigh in Mr. Leavitt's favor
20 in considering the merits of the 60(b) motion.
21 The second issue that the State raises
22 I think in regards to this is that, since there
23 was no ineffective assistance of counsel
24 post-convictionwise, based on Edwards vs.
25 Carpenter, that this court should find that it's

1 an unexhausted claim.
2 However, as we argue in our reply
3 brief, that argument would always prohibit
4 ineffective assistance of counsel of
5 post-conviction counsel being addressed in a Rule
6 60(b) or a procedural default status because there
7 is no independent constitutional right. So if the
8 requirement is there has to be an independent
9 constitutional right for cause, then the Martinez
10 case is basically totally undercut and not
11 applicable.
12 So, for those reasons, I think the
13 court should address the merits of the underlying
14 issues of ineffective assistance of counsel at
15 trial and to determine whether or not the
16 post-conviction counsel were ineffective in
17 raising those issues; and, therefore, that is an
18 excuse for procedural default such that this court
19 should reopen the matter in this -- that's pending
20 before this court and allow us to have an
21 evidentiary hearing and briefing on this matter
22 for an evidentiary hearing and eventually to hold
23 an evidentiary hearing. There is no reason not
24 to.
25 Mr. Nevin will address the issues of

1 the stay, but this matter was filed shortly after
2 Martinez -- 50 days after Martinez and before the
3 mandate was issued in this court. And this court
4 has the jurisdiction to hear it and should
5 continue the stay so that we get a fair
6 opportunity to address the significant issues that
7 we're about to -- that we're about to address.
8 First of all, Your Honor, I would like
9 to note that we have -- we have focused on four of
10 the ineffective assistance of counsel claims and
11 have basically not addressed the others, not --
12 believing that they do not reach the level of --
13 set forth in Martinez. I will address the
14 serology issue and the related issue of the
15 prosecutorial misconduct, and Mr. Nevin will
16 address the other two matters.
17 First of all, there is no question on
18 the serology that the mixture of the blood in this
19 case is of tremendous significance.
20 The prosecutor, in closing argument, in
21 rebuttal closing argument -- in fact, the last
22 thing that he said to the jury was -- and I quote
23 from 2221 and 2222 of the trial transcript -- "One
24 last thing I want to say about blood, and as far
25 as reasons goes, this is the conclusive proof of

1 this case. Ann Bradley said -- you can review
2 your notes, but she said that the analysis she got
3 of O-type blood in one of the places on these
4 shorts -- in other words, the defendant's blood --
5 mingled with a faint reading for A-type blood.
6 Remember that? And how do you get two bloods
7 mixed together in one spot when the
8 victim" -- then he says, "when the defendant
9 claims he bled a week earlier in a room but, yet,
10 others seemed unaware of those -- how do you get
11 two bloods mingled together?"
12 So the serology is an important factor
13 to the prosecutor at closing.
14 The state supreme court made the same
15 finding. In its opinion -- in its opinion, it
16 describes the fact as these were deposited
17 contemporaneously, and the shorts show that it's
18 been deposited contemporaneously.
19 Your Honor, in the memorandum decision
20 that was made on -- in 2000 cited the fact of the
21 mixture of the bloods as being a critical factor
22 in the case. And the Ninth Circuit, again, in
23 describing the facts of the case, said the bloods
24 were mixed. And so that issue is one that goes
25 throughout the case, from the time of trial

1 throughout appeal.
2 So the serology for that is
3 exceptionally important in this particular case
4 because the prosecutor argued if the bloods were
5 put down at the same time, then basically
6 Mr. Leavitt's alibi as to where he was that night
7 and how his nose bled the week before is totally
8 undercut. So it goes to the crux of the case.
9 Regarding the procedural history about
10 the claim of ineffective assistance of trial
11 counsel, it was filed as part of the First Amended
12 Petition as part of Claim 9.
13 The State argued that it was defaulted.
14 They argued that it was specifically defaulted.
15 It was contested, and the court ruled on
16 procedural grounds, in 1996, that this claim and
17 all other claims of trial counsel were
18 procedurally defaulted.
19 The State never argued the merits of
20 that claim. We were never provided an opportunity
21 to present evidence about that particular claim
22 before Your Honor. And there were no
23 determinations in the federal district court about
24 that claim.
25 As the court noted in its order and as

1 we noted in our original motion that we filed
2 before the court's order was set forth, the Ninth
3 Circuit, in a footnote, said that Your Honor had
4 erred in its procedural default ruling; but,
5 nevertheless, we would lose on the merits.
6 Well, that decision is made in a
7 vacuum. This is not an AEDPA case. This is a
8 pre-AEDPA case. So there is no reliance,
9 necessarily, on what was done at the hearing in
10 state court that was held on this issue. We --
11 THE COURT: Counsel, wasn't the Ninth
12 Circuit aware that it was a pre-AEPDA case when
13 they made that comment in the decision?
14 MR. PARNES: They -- I hope -- I believe
15 they were. I mean, it certainly was noted that it
16 was a pre-AEDPA case.
17 But where -- I guess the question is:
18 Where in the record in the district court is there
19 an addressing of those issues? Where have those
20 been presented to Your Honor so that you can
21 consider them in the first instance that -- that
22 the issue was an issue of ineffective assistance
23 of counsel?
24 There was a state post-conviction
25 hearing where the issue was addressed on the

1 record. The claims of ineffective assistance of
2 counsel in the initial post-conviction proceeding
3 in state court, there is one line that was filed
4 by Mr. Thomas Packer, I believe, in the petition
5 that was filed within 42 days of Mr. Leavitt's
6 initial sentencing in 1986. And it claimed that
7 one of the bases was ineffective assistance of
8 trial counsel, and that was the extent of it.
9 Mr. Parmenter then substituted in, and
10 we have not had an opportunity to develop what he
11 did or didn't do in regard to this particular
12 issue, what he did to prepare for the hearing,
13 whether he talked to any experts or not. When we
14 took his deposition in 2006, this claim had been
15 defaulted, and it was not addressed in his
16 deposition and wasn't addressed before the court
17 at the evidentiary hearing in this matter.
18 Mr. Anderson made one reference in the deposition
19 to it, and Mr. Parmenter's comment at the time
20 was, "I don't even recall doing the post-
21 conviction petition in the case." And that
22 was -- that was it.
23 So what we're asking for is one full
24 and fair consideration of the merits of the claim,
25 an opportunity to develop before Your Honor the

1 substance of the claim, because it is critical to
2 the questions of guilt in this case.
3 THE COURT: Mr. Parnes, let me go back to
4 the question of what the circuit considered. I
5 mean, they determined that I was in error in
6 concluding that that was procedurally defaulted
7 and had no reluctance to essentially reach the
8 merits on that issue as far as whether or not it
9 constituted ineffective assistance under
10 Strickland.
11 Why should I assume that they were
12 wrong? I mean, they -- it's not necessarily my
13 job to call into question the wisdom of the Ninth
14 Circuit's decision in that regard. I understand
15 what you're saying, that there was no real
16 development of the record, but the circuit seemed
17 to find that not to be particularly troubling to
18 them.
19 MR. PARNES: Well, I think, Your Honor,
20 under Rule -- under Rule 60(b) and under the
21 provisions of that -- which include, you know,
22 providing when the interests of justice basically
23 require it -- this is a situation in a capital
24 case where there has not been an opportunity to
25 develop the record because of the procedural

1 default ruling.
2 Now, I'm not sure what the circuit
3 looked at, but the State never argued the merits
4 of this issue to the circuit. We never argued the
5 merits of this issue to the circuit. It was never
6 raised in any of the briefs. The only discussions
7 of the ineffective assistance of counsel claim
8 dealt with procedural default. I'm not sure what
9 they looked at, but I think Your Honor retains the
10 right and the power under that Rule 60(b), the
11 grand reservoir of equitable relief in this
12 matter, to say these are critical issues that need
13 to be examined in the trial court. And that is,
14 Your Honor, that we basically have the right to
15 look at these issues and develop the record.
16 As I cited in the part of the brief
17 that talked about this, at the post-conviction
18 hearing, we could -- there is nothing in the
19 record that shows any preparation for that. There
20 are some discussions.
21 Mr. Parmenter did not even call and the
22 state did not call, actually, the trial counsel
23 who apparently argued the motions regarding the
24 exclusion of the evidence initially and
25 discussions -- that's Mr. Hart at the time. Only

1 Mr. Kohler was called. And when he was asked
2 specifically about the mixture of the bloods, he
3 said, "I don't remember," "I don't recall that,"
4 "I don't remember that."
5 So, Your Honor, I think we have a
6 significant claim.
7 THE COURT: Wait. Mr. Parnes, let me -- my
8 recollection was that Mr. Kohler gave some
9 indication -- and perhaps I'm wrong, but my
10 recollection was that Mr. Kohler indicated that
11 there was a concern that -- I think that it was
12 Ms. Bradley's report had already been offered, and
13 the feeling was that the expert retained by
14 defense counsel had basically corroborated what
15 she had said in her report, and then I think the
16 retained expert said that there wasn't really
17 anything he could add to what Bradley had said.
18 Did I misunderstand that? If so, would
19 you correct me?
20 MR. PARNES: Well, part of that is correct,
21 Your Honor, the fact of -- that Mr. Leavitt's
22 blood and the blood typing that was done is
23 corroborated by the defense expert that was used
24 at the time. There's no -- we are not arguing
25 about a lot of the report.

1 However, the specific area of the
2 mixture of the bloods, number one, Ms. Bradley's
3 report didn't even identify that. If I could just
4 go to retrieve my note?
5 THE COURT: Yes.
6 MR. PARNES: Ms. Bradley's report, when it
7 looked at the shorts, said only that there were
8 five locations of human blood group O. Results
9 for genetic markers are listed in the table below.
10 In addition, the shorts were sent to the
11 Serological Research Institute for another test,
12 and then other tests again comes back and says
13 there is only type O blood on there.
14 So her initial report didn't include
15 anything about mixtures of blood; and, yet,
16 counsel never inquired about that, never looked at
17 that.
18 So there was discussion in Mr. Blake's
19 report that there was potentially some mixture,
20 but there was an overlay or an underlay. And the
21 issue that Mr. Kohler was asked about at the
22 post-conviction hearing was simply, "Well, do you
23 recall that?"
24 And he said, "I don't recall that," "I
25 don't know if we talked to him about it," "I don't

1 know if Mr. Hart talked to him about it." There
2 was never development of the mixture.
3 So, yes, on the one hand, the expert
4 would -- the defense expert would get on the stand
5 and would confirm that some of the genetic -- that
6 most of the genetic markings that were found on
7 the O blood and the other typing was the same.
8 But there was a significant difference in terms of
9 the mixture of the blood, and that is the key part
10 in this serology. It's not: Is Mr. Leavitt's
11 blood there? It certainly is. The question is:
12 When was this blood deposited?
13 THE COURT: Mr. Parnes, let me ask one more
14 question on that issue.
15 MR. PARNES: Sure.
16 THE COURT: Both in Martinez and I think in
17 the -- I think it's the Sexton case, where the
18 Ninth Circuit has started talking about what
19 Martinez means, has suggested that because there
20 was sort of an overlay of Strickland over
21 Martinez, that the court, in determining whether
22 or not reconsideration -- or the ineffective
23 assistance of counsel by post-conviction relief
24 counsel will constitute cause for avoiding a
25 procedural default of the ineffective assistance

1 claims of trial counsel, that the court should
2 include kind of a Strickland analysis. And, of
3 course, one of the two prongs of Strickland would
4 be deficient performance. The second would be
5 prejudice.
6 Are you suggesting that what we now
7 know, what you have told us -- which is that there
8 was at least some potential for an argument of an
9 overlay rather than an intermixture of the
10 bloods -- that that's enough to suggest that there
11 could have been some likelihood of a different
12 result at trial?
13 MR. PARNES: Absolutely. I mean, basically,
14 when you look at what the -- what the prosecution
15 argued at trial, the conclusive proof is the
16 mixture of the bloods. That's the argument:
17 Conclusive proof of the mixture of the bloods,
18 not -- not the different statements that
19 Mr. Leavitt gave.
20 All the way through in the decisions of
21 the -- of the courts, the significance of the
22 mixture of the bloods contemporaneously deposited
23 is a critical phrase that runs throughout. And
24 if --
25 THE COURT: Okay. Let me ask one other

1 question.
2 MR. PARNES: Sure.
3 THE COURT: Is there any indication that
4 that overlay could not have occurred almost
5 simultaneously as opposed to being a week apart?
6 Do we have any indication of one version over the
7 other?
8 Because, you know, you can talk about
9 intermixture; that's language the prosecutor used.
10 But unless the experts could in some way suggest
11 that there was a temporal gap between the overlay
12 here that they could, in fact, determine, I don't
13 know that that's going to add a whole lot to what
14 Mr. Leavitt wanted to argue here. In other words,
15 if, yes, there was an overlay, but the overlay
16 could have been done five minutes after the
17 initial blood was applied or 30 minutes, that
18 would not really undermine the government's -- or
19 the state's case.
20 And that's -- do we have anything in
21 the record on that?
22 MR. PARNES: Well, Your Honor, at this
23 point, we don't. Because we basically have filed
24 this motion asking for an opportunity to present
25 exactly that kind of information to the court. We

1 have also asked the court to release the evidence
2 for retesting partially related to the 60(b), and
3 the court has denied that, and the State continues
4 not to be willing to release the evidence.
5 I asked Mr. Anderson -- I asked the
6 state lab just yesterday to provide us if they had
7 the notes, because we talked to an expert on the
8 telephone, and that expert said, well, they needed
9 the lab notes. And we're trying to develop that.
10 We're trying as rapidly as possible to develop it,
11 and the State won't even give us the notes.
12 So it's not, in essence, of what we're
13 asking for the right to do that. Do I have
14 concrete evidence today of that? No. I have the
15 fact that there was the significance of the
16 mixture; there wasn't an expert who said overlay
17 and underlay; and we're trying to develop exactly
18 the question that your -- that Your Honor asked.
19 It may be such that we can't develop
20 it; I'll concede that. I mean, that's -- I'm not
21 here to argue that I have this thing in my hip
22 pocket, and I have got this expert who is saying
23 X, Y, and Z. But that's the purpose of
24 reconsideration. It's the purpose of going to get
25 the one full and fair hearing that Mr. Leavitt is

1 entitled to in this capital case. And he's never
2 got it on this, and it's a very significant issue.
3 THE COURT: All right.
4 MR. PARNES: The argument -- let me -- if
5 you don't have any questions about that, I
6 certainly will move to the issue of prosecutorial
7 misconduct and the failure to object to that.
8 And in this instance, the Ninth Circuit
9 said, well, we find error in one of the arguments,
10 the link-in-the-chain argument. But we don't --
11 we're looking at that on the merits. We don't
12 think that's standing alone.
13 But the court didn't look -- the Ninth
14 Circuit didn't look at a number of other arguments
15 about the prosecutorial misconduct and didn't look
16 at it in a cumulative fashion the way we are
17 suggesting the court should do. And we're asking
18 the court to consider that, as well, on an ability
19 for us to find out from trial counsel did they
20 have a tactical reason not to object to issues
21 that were clearly improper for the court to
22 have -- the prosecutor to have argued.
23 So we're asking, in related fashion to
24 the serology thing, that the issue of
25 prosecutorial misconduct and the failure to object

1 for an error that I think the Ninth Circuit said
2 was just plain wrong -- I mean, his argument was
3 just plain wrong -- why didn't they object to
4 that.
5 I think when you look at ineffective
6 assistance of counsel claims cumulatively, as you
7 must, then those errors which, standing alone,
8 might not make a difference, when the whole
9 picture is developed under Strickland, we believe
10 that we can show prejudice in this matter on those
11 bases.
12 If there are no further questions on
13 those, I will turn it over to Mr. Nevin.
14 THE COURT: No. All right. Mr. Nevin.
15 MR. NEVIN: Your Honor, thank you. I'll
16 just address briefly the -- the failure to object
17 to testimony from a former girlfriend regarding
18 display of a knife during a sexual episode and the
19 issue of the reasonable doubt instructions and --
20 THE COURT: Mr. Nevin, you're not coming
21 through quite as clearly as Mr. Parnes did. I
22 don't know if you can step closer to the mic or
23 bend it down, or perhaps we can increase the
24 volume either there or here. Let's go ahead and
25 try it.

1 MR. NEVIN: Mr. Parnes tends to be clearer
2 than I do, Your Honor.
3 THE COURT: You're very clear, just not
4 quite as loud.
5 MR. PARNES: It's Brooklyn, Your Honor.
6 MR. NEVIN: Your Honor, this -- the
7 testimony is from Barbara Rich. Counsel is
8 correct in the response memorandum that it
9 involves Barbara Rich and her testimony that a
10 knife is displayed in a suggestive and somewhat
11 odd way during a sexual encounter.
12 And, you know, the Ninth Circuit looks
13 at this and refers to it, and I think the court --
14 the court says -- it develops the argument that --
15 that this could have been seen as being relevant
16 to whether he had actually cooperated with the
17 police as -- because he had not produced this
18 knife and so on.
19 But then the court says, still, in all,
20 the connection was pretty thin. And I think there
21 is no question that that's the case.
22 The court does go on to say that it
23 concludes that this evidence did not have
24 substantial injurious effect or influence in
25 determining the jury's verdict.

1 And, you know, Your Honor, it's
2 probably hard to -- I mean, I think that is the
3 remark of an appellate court looking at the dry
4 record. And it is -- I think it's hard to
5 overemphasize the effect that this kind of
6 testimony has where you have the forensic evidence
7 that you have of the removal of sexual organs.
8 You have testimony about a sexual encounter. You
9 have testimony about a knife during the course of
10 it.
11 The testimony goes way beyond in its
12 injurious effect. It goes way beyond just that
13 question of whether he had been cooperative with
14 the police. And in the context of a real trial in
15 front of real jurors, I submit to the court that
16 that would have had -- that that would have been
17 an extremely dramatic and salacious and effective
18 for the state type of argument.
19 But, as the Ninth Circuit -- as even
20 the Ninth Circuit concedes, the evidence or the
21 argument supporting the relevance of that is
22 extremely thin. And that's why we included it in
23 the matrix of errors that counsel made, so
24 suggesting and arguing to the court that the court
25 should consider these matters cumulatively and

1 look at them not only individually but also
2 together.
3 THE COURT: Mr. Nevin, didn't -- just a
4 moment. Let me just inquire. Didn't Mr. Kohler
5 indicate -- or even if he didn't indicate -- can't
6 we assume that a decision was made that Ms. Rich's
7 testimony was important because it was tied in to
8 an explanation as to how it was that he received
9 the cut that he did, which -- I mean, one of the
10 really more telling pieces of evidence the
11 government -- the State had was that he apparently
12 had gone to the emergency room or at least had had
13 medical attention for a serious cut on the very
14 day that Ms. Elg died. As I recall, there was
15 some explanation that that was -- it was incurred
16 while he was trying to prevent a suicide attempt,
17 that all of which was triggered by a letter
18 Ms. Rich wrote concerning the sexual relationship.
19 Isn't that the kind -- if that is all
20 true, isn't that the type of kind of tactical
21 decision that Strickland says that we don't
22 second-guess an attorney for making in the context
23 of ineffective assistance of counsel claims?
24 MR. NEVIN: Well, Your Honor, again, I'd
25 just respond to that a couple of ways. You know,

1 first, Mr. Parnes makes the point that this is
2 just something we haven't had the opportunity to
3 develop. So I don't believe that Mr. Kohler
4 articulated it -- I don't recall, as I stand here,
5 exactly how Mr. Kohler addressed this and whether
6 he articulated this as a strategic choice.
7 But it is correct, at least in my
8 recollection, what the court says; that there was
9 a letter that Ms. Rich wrote that -- the
10 explanation was that there was a letter which
11 Ms. Rich wrote which fell into the hands of
12 Mr. Leavitt's wife, and that caused her to attempt
13 to commit suicide.
14 But the knife -- whether he had a knife
15 while engaged in that act of sexual intercourse or
16 in that sexual encounter -- whether he had a knife
17 with him is not relevant to whether reading the
18 letter caused her, Mr. Leavitt's wife, to commit
19 suicide.
20 My recollection --
21 THE COURT: Attempt suicide.
22 MR. NEVIN: To attempt suicide, yeah. Thank
23 you.
24 And the -- so I guess my point is my
25 recollection of the evidence is not that she

1 attempted suicide because he had a knife during a
2 sexual encounter. The evidence --
3 THE COURT: Did the issue of the
4 knife -- maybe you can help me. Did the issue of
5 the knife come in upon direct examination by
6 Mr. Kohler of Ms. Rich?
7 MR. NEVIN: Yeah. It came out -- I don't
8 remember, Your Honor. And I don't know if the
9 court can see, but I looked at Mr. Parnes, and he
10 tells me that it did come out on cross.
11 THE COURT: Well, see, so it's not a
12 question of whether Mr. Kohler, you know, led with
13 his chin and then offered that, but a question
14 more of whether there -- it should have been
15 allowed on cross-examination. But, again, didn't
16 the Ninth Circuit reach that issue on the merits
17 and say that it probably shouldn't have happened,
18 but it was not enough to justify -- well,
19 basically, rule against the petitioner on that
20 issue?
21 MR. NEVIN: Yes. The Ninth Circuit reached
22 the issue, Your Honor. And I -- we include it
23 here because it -- because it is part of this
24 entire picture of the failure to take action.
25 And, Your Honor, I understand the

1 court's point about leading with the chin, but I
2 think this is an issue that a reasonable lawyer --
3 and I believe if we were allowed to develop this
4 issue, we could prove this to the court -- that a
5 reasonable lawyer dealing with a piece of evidence
6 like that would have addressed it on a motion in
7 limine and would have gotten a ruling from the
8 court as to the admissibility of that and would
9 have made a decision about whether to pursue the
10 evidence based on that; or, in the alternative,
11 would have seen it coming and would have been
12 on -- that lawyer would have been on his toes to
13 tender an objection in a timely fashion in such a
14 way as to preclude that line of questioning.
15 So laying it out there and then just
16 waiting for it to happen is -- is deficient
17 performance. And I understand the court's point
18 about the Ninth Circuit's ruling. I respectfully
19 suggest that the Ninth Circuit's ruling is
20 incorrect given the explosive and salacious
21 quality of his testimony. But, you know,
22 nonetheless, it's offered here to provide a full
23 picture of the cumulative effect of this -- of the
24 ineffective assistance.
25 The -- Your Honor, the reasonable doubt

1 instruction, I know that the court and counsel
2 have addressed this repeatedly. And we have
3 addressed it again now in this briefing, and so I
4 won't touch it on at great length.
5 The effect of standing by and watching
6 the jury be instructed on the presumption of
7 innocence and the requirement for proof beyond a
8 reasonable doubt in the way that they were was, in
9 effect, to remove the requirement for proof beyond
10 a reasonable doubt.
11 And I think that's the -- you know,
12 many of these instructions have problems, and I
13 have laid those out in detail over the years to
14 the court. Many of the instructions had problems,
15 but it was Instruction No. 12 which said that the
16 requirement for proof beyond a reasonable doubt
17 just didn't apply in the case of someone who was,
18 in fact, guilty, and that it was not designed --
19 it was only designed to protect persons who were,
20 quote, unquote, "innocent."
21 The only way to understand Instruction
22 12 is that it does away with the requirement for
23 proof beyond a reasonable doubt. So when you put
24 these -- when you put the pieces of this puzzle
25 together as we stand here looking at counsel's

1 ineffectiveness at trial, what you have is a
2 blending of improper arguments not supported by
3 the facts, not properly supported by the facts, we
4 submit, with respect to the mixing of the blood.
5 And that being the last thing that the prosecutor
6 is choosing to say on behalf of his case to this
7 jury, you have that.
8 And you have also this indication that
9 the -- that this requirement for proof beyond a
10 reasonable doubt in a circumstantial evidence case
11 just doesn't apply the way -- the way In re
12 Winship requires that it apply.
13 And the net result of that, Your Honor,
14 is that there is a reasonable likelihood of a
15 different result if you do this stuff right in
16 this particular case, if you remove this issue of
17 the time, the mixture of the blood. And I
18 understand the court's point about overlay and
19 underlay, but it was referred to as a mixture.
20 And the -- really, when you read Ms. Bradley's
21 testimony, she doesn't say there was a mixture.
22 She says it's possible -- she says it's even
23 possible that there was a mixture, and it
24 gets -- it gets leveraged into the actual fact of
25 a mixture, and it gets used in very dramatic and

1 effective form to prejudice the jury and to
2 convince them that the bloods must have been laid
3 down at the same time.
4 And so I see those, and I suggest to
5 the court counsel should have simply objected to
6 these instructions. And if the jury had been
7 told, no, the requirement for proof beyond a
8 reasonable doubt really does apply to this case,
9 it's not just limited to someone that you've made
10 a finding previously is innocent or that is not
11 guilty according to -- in fact according to some
12 other standard -- and the court will recall that
13 there was also an instruction that said that the
14 facts of the case didn't need to be proved beyond
15 a reasonable doubt.
16 So when you then say reasonable -- the
17 requirement for proof beyond a reasonable doubt
18 does not apply in the case of someone who is --
19 who is guilty in fact, you are saying to the jury
20 this preliminary determination of whether he is
21 really guilty in fact doesn't have anything to do
22 with the requirement for proof beyond a reasonable
23 doubt. You have taken away this bedrock
24 requirement of the law that when we get to
25 Sullivan, we know that -- that the requirement for

1 proof beyond a reasonable doubt is structural --
2 constitutes structural error that's not analyzed
3 for harmlessness.
4 And the reason for that is that you
5 cannot calculate the effect that taking away a
6 structural element of the way we run criminal
7 cases in the United States -- you cannot calculate
8 that with precision, and you cannot assume that it
9 has not had an injurious effect.
10 So this issue comes up again now not in
11 the context of whether or not this can be raised
12 on habeas, or not whether or not it's an erroneous
13 instruction. All that has already been decided.
14 It comes up now in the simple fact of a failure to
15 object to it and raise it on the part of the trial
16 counsel.
17 Your Honor, finally, with respect to
18 the stay question --
19 THE COURT: Could I ask you just one -- if
20 you wouldn't mind returning just to the jury
21 instruction question. Isn't it fair to say that
22 an overall review of the earlier decisions of the
23 Ninth Circuit at least suggests that, in terms of,
24 I guess, prejudice analysis, that the circuit
25 would not find trouble with -- apart from being

1 the Teague bar and all of that, that the circuit
2 would not -- in terms of analyzing whether there
3 was any prejudice from the failure of trial
4 counsel to object to the instruction, that it
5 would not have constituted the type of prejudice
6 that would justify relief under Strickland?
7 I mean, it just struck me -- again, you
8 know full well that I did not agree with the
9 circuit. They reversed me on that issue on Teague
10 grounds. I thought that there was some serious
11 concerns about the reasonable doubt instruction if
12 only because, you know, giving 10, 11, 12, or 13
13 different versions of reasonable doubt, the
14 cumulative effect of those confusing instructions
15 including some that were clearly at least
16 questionable, if not wrong -- there is no question
17 that I'm bound by the law of the case. I'm also
18 bound in terms of analyzing this case under
19 Strickland and Martinez with what the circuit has
20 at least indicated they think. And it just seems
21 clear, from the circuit's decisions here, that
22 they would not find any prejudice resulting from a
23 failure to object to these instructions.
24 Can you indicate why you think that
25 perhaps is not true?

1 MR. NEVIN: I think it's not true,
2 Your Honor, because I believe that this issue was
3 never reached. I mean, in other words, it's -- to
4 the extent that one can read between the lines and
5 get at the question of whether it was, in their
6 opinion, harmless error, one is looking at dicta.
7 It's -- the issue was Teague. End of story, I
8 suppose, for the question of whether or not this
9 is binding.
10 And I understand what the court is
11 saying. It's -- obviously, they didn't make this
12 finding. But I don't see why it is the right
13 thing to do for the court to say: Well, you know,
14 reading between the lines or reading the
15 inferences, I think that if they had reached the
16 merits, they would have decided the question in
17 this particular way.
18 Which one might ask: Which panel?
19 There were two separate panels, and there's been
20 indication that there will be a third panel
21 because as the -- if this case is appealed -- and,
22 of course, I say "if." We have obviously appealed
23 the court's denial of our motion to send the
24 evidence off for testing. There is a different
25 panel now.

1 So which panel are we referring to when
2 we ask that question? And I think, obviously, the
3 court -- this court can't -- I don't think this
4 court can reasonably engage in that kind of
5 speculation, and I think that's why you have a
6 rule about -- that's why you have rules about
7 dicta.
8 So I guess my suggestion to the court
9 is that -- is simply that we should have the
10 opportunity to present this issue, and that the
11 court shouldn't try and second-guess or not -- I
12 guess second-guess would be the wrong term, but
13 try to guess in the first instance what the Ninth
14 Circuit would have done if they had -- if it had
15 reached this question directly.
16 THE COURT: All right.
17 MR. NEVIN: Then, Your Honor, finally, just
18 with respect to the question of the stay, under
19 the local rule, we're clearly entitled to a stay.
20 Under 9.2(c), we're clearly entitled to a stay.
21 There has never been a stay in the
22 case. There was a stay that the United States
23 Supreme Court issued in 19 -- in 1992. It, by its
24 terms, dissolved if and when the cert. petition
25 was denied back then. And that was denied in

1 November of 1992. And that stay dissolved.
2 And the State never sought another
3 warrant, presumably, because they realized --
4 well, I shouldn't presume to say. But, in any
5 event, the State never sought another death
6 warrant.
7 And, therefore, if I remember
8 correctly, it was Mr. Parnes who drafted the
9 petition and the initial moving -- the initial
10 pleadings. There was no reason to seek a stay at
11 that time, and so the court didn't -- we just
12 never got into this question, and the court -- and
13 no death warrant was ever sought again until just
14 a couple of weeks ago.
15 So Rule 9.2(c) says plainly that the
16 district judge must immediately review the
17 petition or preliminary initial findings; and if
18 the matter is found to be properly before the
19 court, the court will issue an initial review
20 order staying the execution for the duration of
21 proceedings in this court. And -- excuse me. We
22 are still within the duration of these proceedings
23 in this court. This is not an academic matter
24 because -- because immediately -- I mean,
25 literally within hours of the issuance of the

1 mandate, Mr. Anderson was in the chambers of Judge
2 Shindurling in Idaho Falls obtaining a new death
3 warrant and setting the execution date for June
4 the 12th.
5 And we have -- you know, we have
6 litigated this issue in state court, and the
7 litigation is ongoing. And the Idaho Supreme
8 Court is going to address it as well.
9 But the point is that what we get here
10 is that we are now in the posture of -- now we're
11 in the posture of an impending execution date that
12 is in many respects artificial, by which I mean
13 this: The 19-2715 -- Idaho Code Section 19-2715
14 does not require that the State obtain a warrant
15 with any -- within any particular time. It could
16 have been done at any time, as long as the death
17 sentence remained uncarried out, as long as
18 Mr. Leavitt had not been executed. The State was
19 not required to do it immediately or any --
20 according to similar language. That language was
21 removed from an earlier version of the statute.
22 But Mr. Anderson did do it immediately
23 despite our demand for an opportunity to be heard
24 so that we could have said to the state district
25 court: We have a Martinez 60(b) motion pending in

1 front of Judge Winmill. Don't issue a new death
2 warrant now and create artificially a sense of
3 urgency that -- that doesn't need to be there.
4 Mr. Leavitt is not going anywhere, and
5 you will be able to carry out your execution later
6 if -- after Judge Winmill rules on this and any
7 appeals that we have a right to take to the Ninth
8 Circuit if the court rules against us, after all
9 that is complete.
10 And you -- you know, you know that
11 where it's going is that Mr. Anderson is going to
12 get the death warrant, and then he is going to
13 come to this court and say: You must not step in
14 now. You know, the state courts have acted and so
15 on, and argue to the court that it's not
16 appropriate to act now.
17 But we are entitled to the stay under
18 the local rule, Your Honor, and we do ask that the
19 court grant us a stay.
20 And that's my argument.
21 THE COURT: All right. Just so it's clear,
22 if -- obviously, the stay -- I mean, we're going
23 to work on a decision -- we might even have it out
24 today but certainly no later than Monday -- a
25 decision on the merits. Unless I grant the

1 requested relief, there would be no reason to
2 impose a stay.
3 Do you agree -- I assume you agree with
4 that. I mean, I don't intend to leisurely resolve
5 the issue. I think the matter is too pressing,
6 and it simply has to be resolved quickly. And if
7 the decision is adverse -- well, actually,
8 regardless, I assume there would be an immediate
9 appeal to the circuit either by you or by
10 Mr. Anderson.
11 And that's why I'm just not -- I guess
12 I'm questioning -- well, I'll just have to review
13 the rule itself with regard to the absolute need
14 for a stay in this case.
15 MR. NEVIN: And, Your Honor, just -- I mean,
16 I would just say, in that respect, we filed our
17 60(b) motion before the mandate was returned,
18 before the United States Supreme Court denied our
19 cert. petition, we put -- we knew that this was
20 coming. We had -- the court had defaulted us
21 previously on this, on ineffective assistance of
22 trial counsel. So it was clear after Martinez
23 that we were going to ask the court to address
24 this question, and we did that in a timely
25 fashion.

1 And, respectfully, Your Honor, I think
2 it is appropriate to issue a stay even if the
3 court denies the relief because we -- because it's
4 not fair that the consideration of this issue be
5 accelerated in this way and be done in such an
6 accelerated fashion simply because of the pendency
7 of an optional death warrant.
8 So, yes, I do ask that the court grant
9 the stay.
10 THE COURT: All right. Okay. Thank you.
11 Mr. Anderson?
12 Counsel, I might indicate I don't like
13 the way we're set up in this courtroom. To look
14 at the monitor, I'm looking to the side. And I
15 can see that you probably think I'm looking off
16 into space rather than directly at you. Please
17 understand that I am looking at the screen even
18 though it may appear to you that I'm looking at
19 the wall to my right. So understand that you do
20 have my attention, and I'm not just looking off
21 into space.
22 So, go ahead.
23 MR. ANDERSON: And I understand that,
24 Your Honor. I'm also looking at the screen versus
25 the camera above the screen, and so that's not a

1 problem at all.
2 I would like to start, though,
3 Your Honor, where counsel left off, and that is
4 the stay.
5 Local Rule 9.2(c) simply doesn't apply
6 in this situation. That rule was adopted for
7 purposes when a capital habeas case begins.
8 Because the normal course of the situation is that
9 when the Idaho Supreme Court affirms a capital
10 sentence and a petition for cert. is then denied,
11 that the State does go and secure a death warrant.
12 Why that didn't happen in this particular case I
13 have no idea. I wasn't representing the state at
14 that time; my predecessor was.
15 But that's the purpose of 9.2(c) if
16 9.2(c) even existed at the time that this action
17 was committed, before this started years ago in
18 front of this court.
19 As to 19-2715, the statute was amended
20 this last legislative session with an emergency
21 clause. And the bottom line on it, Your Honor, is
22 that it says the court -- or the State shall
23 obtain a warrant, a bond issuance of the
24 remittitur or the mandate. We don't have an
25 option.

1 Is there a specific time frame that it
2 says we have to do that? No, that's certainly not
3 in there. But when it says we shall, we take that
4 as meaning that we need to do that as quickly as
5 we can, because there is no reason not to at that
6 point because the bottom line on it is that there
7 is no stay in place, and there is, in fact, a
8 judgment that is still in effect, and we had an
9 obligation to do that.
10 So I'm assuming, by counsel's reliance
11 upon the local rule, that there is at least an
12 implied concession that they can't meet the
13 standard four-part prong for issuance of a stay
14 that is generally required. And first and
15 foremost is likely success on the merits, which
16 does bring me to the merits, Your Honor.
17 I want to discuss first the serology
18 evidence. And actually, before I do that,
19 Your Honor, I think it's important that we not
20 lose sight of the fact that Martinez -- the
21 United States Supreme Court specifically said that
22 Martinez is a narrow holding. It is not one of
23 these cases where it should open the floodgates
24 for every ineffective assistance of trial counsel
25 claim.

1 The trial counsel claim has to be
2 substantial. And overlying that, at least in some
3 fashion, are the Strickland standards. And what I
4 am particularly --
5 THE COURT: Counsel, let me ask you about --
6 the requirement that the ineffective assistance of
7 counsel claim be substantial, I assume that's
8 geared towards the ineffective assistance of trial
9 counsel; correct?
10 MR. ANDERSON: That's my understanding in
11 Martinez, Your Honor, yes.
12 And does that change in some fashion --
13 or maybe not "change" is the right word -- but
14 does it modify in some fashion the two-prong
15 Strickland standard and require a higher burden?
16 I'm not sure that the court made that very clear.
17 Certainly, I don't believe the Ninth Circuit has
18 gone that far in Lopez and Sexton.
19 But I think there can certainly be that
20 argument made, because Justice Kennedy repeatedly
21 stated that Martinez was narrow in its reach, and
22 that was the exact word. Certainly he didn't use
23 the words that it wasn't designed to open the
24 floodgates, but that can certainly be implied.
25 And we have certainly seen, even in

1 this district, that the floodgates are being
2 attempted to be opened, both by noncapital and
3 capital cases. Every case we have where we have
4 an IAC of trial counsel claim in the petition, we
5 have a Martinez case, and --
6 THE COURT: Counsel, isn't it perhaps just a
7 better characterization of Justice Kennedy's
8 language that he's simply acknowledging that
9 Strickland itself is essentially a narrow window
10 of opportunity, if you will, for a petitioner in a
11 habeas case because the very nature of the
12 two-prong test requires first you actually show
13 deficient performance after giving all due
14 consideration to the need for trial counsel to
15 have a lot of discretion in their decision-making,
16 and a requirement that there is some chance that
17 the outcome was affected and therefore the
18 prejudice can be shown?
19 I mean, isn't that perhaps just another
20 way of saying why the claim has to be substantial,
21 because it has to be in a case that will pass
22 muster under Strickland?
23 MR. ANDERSON: That may very well be,
24 Your Honor. But I question why, then, Justice
25 Kennedy actually used the word "substantial" as

1 opposed to saying: You simply have to meet the
2 Strickland standard. And repeatedly he used the
3 word "substantial."
4 But that does raise the point, as far
5 as Strickland and its progeny, that IAC claims
6 are -- defendants/petitioners have a high burden
7 under those cases. And I think if you look at the
8 Supreme Court decisions that have been released
9 recently, whether they be pre-AEDPA or post-AEDPA,
10 they have reaffirmed the high burden associated
11 with Strickland claims.
12 I certainly recognize that -- that
13 Pinholster is an AEDPA case, but when you look at
14 the language that just addresses the high burden
15 associated with Strickland, it is a high burden.
16 The other thing associated with
17 Strickland and that counsel alluded to, and
18 certainly it was in their briefing, is that
19 somehow the State has the burden of establishing
20 that the decisions that were made were tactical
21 under the deficient performance prong, and that's
22 simply not true.
23 If you look at Pinholster, in fact, on
24 page 1404, the court cites Yarborough vs. Gentry,
25 where the Supreme Court said there is a strong

1 presumption that counsel took certain actions for
2 tactical reasons rather than through sheer
3 neglect.
4 There is a presumption that it's
5 tactical. We have no burden to prove that it was.
6 That is already there. It is Leavitt's burden to
7 prove that it wasn't tactical, which brings us
8 directly to the serology evidence.
9 If, in fact, the State actually had a
10 burden to prove that it was tactical as far as the
11 serology evidence, I would submit that we have
12 actually met that. And the reason I state that,
13 Your Honor, is because, as counsel alluded to --
14 and I don't remember which attorney it was --
15 actually, it was Jay Kohler -- testified at the
16 UPCPA hearing -- and it's cited on page -- the
17 relevant portion of his testimony is cited on
18 page 28 -- that one sentence: "In fact, we felt
19 that he would perhaps, in the eyes of the jury,
20 tend to corroborate the findings of Ann Bradley."
21 Now, I recognize that counsel is trying
22 to make a distinction between overlay versus
23 mixture, but I can only imagine what would have
24 happened if trial counsel had actually put
25 Dr. Blake on the stand to corroborate in any

1 fashion any of the testimony from Ann Bradley. We
2 would then be faced with an ineffective assistance
3 of counsel claim for calling -- because trial
4 counsel called that witness and corroborated Ann
5 Bradley. And that's why we don't second-guess
6 tactical decisions. It simply should not be done.
7 Above and beyond that, Your Honor, as
8 was discussed, the Ninth Circuit, in Footnote 40,
9 said this case is -- this issue is done. It's
10 over.
11 Now, I recognize that counsel wants to
12 present new evidence regarding this to establish
13 prejudice, but the footnote in the Ninth Circuit's
14 opinion is law of the case, and I don't know how
15 this court is permitted to -- whether it's
16 overrule, second-guess or whatever one wants to
17 call it, a decision from the Ninth Circuit
18 regarding this specific case that -- where the
19 court says both claims do lose on the merits as a
20 defendant's disagreement with his trial counsel's
21 tactical decisions cannot form the basis for an
22 ineffective assistance of counsel claim.
23 It simply was tactical, and there
24 is -- I don't know how one gets around that.
25 In addition to that, Your Honor, if I

1 heard counsel correctly -- and I'll be candid and
2 say that I haven't read Ms. Bradley's report for
3 some time, if I even have it; I'm not sure I have
4 ever read it. But if, in fact, Ann Bradley's
5 report didn't state that there was a mixture and
6 that testimony simply came out at trial, then I
7 don't know how counsel can be ineffective for not
8 calling Dr. -- Dr. Blake to rebut something that
9 he didn't know was going to happen, if it isn't in
10 a report. But it really doesn't matter. It was
11 tactical in nature.
12 As far as the closing arguments of the
13 prosecutors, again, we presume the reason counsel
14 didn't object -- trial counsel didn't object is a
15 matter of tactics.
16 Now, counsel -- Mr. Nevin indicated --
17 actually, it was Mr. Parnes, I believe, indicated
18 that they would like to find out why it wasn't
19 objected to. Well, there's a presumption that it
20 wasn't objected to.
21 And if you look at the cases -- we
22 haven't cited them in our brief because I just
23 didn't think this was a very significant issue,
24 candidly -- objections by defense attorneys to
25 prosecutors' closing arguments are nearly -- I

1 won't say "always" -- but nearly always tactical.
2 And the reason for that is that defense attorneys
3 don't want to highlight different aspects of the
4 prosecutor's closing argument by making an
5 objection that may, in all probability, be
6 overruled. That's why we don't second-guess
7 tactical decisions.
8 And above and beyond that, the Ninth
9 Circuit addressed this claim as a due process
10 claim and rejected it on its merits. I don't know
11 how Mr. Leavitt can establish prejudice based upon
12 the Ninth Circuit's decision.
13 As far as the testimony of Barbara
14 Rich, again, it's law of the case as far as what
15 the Ninth Circuit said. And the Ninth Circuit
16 said there was no prejudice as a result of that
17 testimony. I think I'll leave that as it is.
18 As far as the jury instructions,
19 Your Honor, and particularly Instruction 12 in the
20 presumption instruction, I know this court is
21 intimately familiar with this issue, and I'd
22 remind the court -- I know the court has also
23 wrestled with it, because I'd remind the court
24 that initially, when deciding this issue as far as
25 a due process claim on the merits, the court ruled

1 against Mr. Leavitt. And it was only upon
2 reconsideration that the court decided that
3 Instruction 12 violated Mr. Leavitt's due process
4 rights.
5 Contrary to what counsel has argued, I
6 think the Ninth -- this court can look at what the
7 Ninth Circuit would do, particularly as far as the
8 prejudice prong -- prejudice prong.
9 And I would actually note -- and we
10 haven't done it in our brief, but in Rhoades vs.
11 Arave -- and this is Judge Lodge's decision. It's
12 in the Baldwin case. And the reason I raise this
13 is because, of course, in Rhoades, the same
14 instruction was used. The same instruction was
15 used in the McKinney case.
16 And I would submit that at least in the
17 mid '80s, this instruction -- I'll also admit this
18 is somewhat speculative on my part, but I would
19 submit when you have three capital cases that have
20 the same presumption of innocence instruction,
21 that this was a, quote, "stock instruction" that
22 was given in criminal trials in the mid '80s in
23 eastern Idaho.
24 THE COURT: Counsel, are you referring to a
25 specific instruction or --

1 MR. ANDERSON: I'm referring to Instruction
2 12, the presumption of innocence instruction,
3 Your Honor.
4 THE COURT: Okay.
5 MR. ANDERSON: Because that instruction was
6 the same instruction in McKinney, in Rhoades, and,
7 of course, in this case.
8 But if we look at Judge Lodge's
9 decision -- and I like the language that he used
10 particularly. And, of course, it's -- it's on
11 star 17, but the court looked at what the Ninth
12 Circuit had done as far as this instruction in the
13 Leavitt case when reviewing Rhoades' case. And
14 Judge Lodge said, "The district court's decision
15 in Leavitt must now be viewed through the lens of
16 the Ninth Circuit's decision on appeal. And while
17 the appellate court ultimately decided that
18 Leavitt's claim was Teague-barred, it made several
19 observations on its way to this conclusion that
20 betrayed its skepticism with the merits-based
21 decision."
22 Now, if you look at the Ninth Circuit's
23 decision in Leavitt, the other instructions that
24 the court -- this court had problems with just
25 didn't bother the Ninth Circuit. Yes, they were

1 troubled by the presumption of innocence
2 instruction, unquestionably. But even in the
3 Reynolds case from the Ninth Circuit, the Ninth
4 Circuit never concluded that it was constitutional
5 there.
6 The bottom line on this is when you
7 look at the instructions as a whole that were
8 given in this case, the Ninth Circuit in this case
9 would not have had any problem finding that there
10 was no error. And that's supported not only by
11 Judge Lodge's decision in Rhoades but by the Ninth
12 Circuit's decision in Rhoades itself, where they
13 affirmed that instruction on the merits. They
14 didn't like it, but they affirmed it.
15 I would submit, based upon what the
16 Ninth Circuit said in Rhoades, and as you read
17 between the lines in the Leavitt -- in the Ninth
18 Circuit's Leavitt decision, that there simply is
19 no prejudice.
20 Above and beyond that, Your Honor, I do
21 want to touch very lightly on the deficient
22 performance prong, but I think it's important to
23 keep in mind that the issue in the mid '80s
24 regarding the presumption of innocence
25 instruction, as I said, not only was -- appears to

1 be a stock instruction in eastern Idaho, but it
2 had been -- was used in other states.
3 I know the court is familiar with that,
4 with those line of cases even in federal courts.
5 There were federal courts that had said, although
6 they were split, admittedly, on the proper use of
7 this instruction, but there were courts that had
8 said that it wasn't error to use this instruction.
9 And I would submit, Your Honor, that
10 because Idaho and particularly Leavitt's trial
11 counsel are not bound by the decisions of the
12 Ninth Circuit -- particularly the Reynolds
13 decision, where it wasn't even a constitutional
14 violation -- that while there may not have been a,
15 quote, tactical reason to object to this, it was
16 not deficient performance because it was not
17 unreasonably -- I can't remember the exact
18 language for the deficient performance prong now,
19 but it simply was not -- I wish I could remember
20 that language now, Your Honor, and I apologize.
21 You don't have to have a tactical
22 decision to get around or to bypass, or whatever
23 phrase is to be used, the first prong of
24 Strickland. The bottom line is that counsel do a
25 lot of things in the course of a trial, the course

1 of preparing for a trial, and most of those
2 decisions should not be second-guessed unless
3 there is an objectively reasonable problem with
4 the decisions that they have made. And when you
5 look at the decisions from the other circuits that
6 have affirmed this particular instruction, I
7 struggle to understand how counsel's performance
8 would have been deficient.
9 THE COURT: Okay. Let me -- I'm a little
10 troubled by that. In other words, even though a
11 case might -- a petitioner may be able to show
12 actual prejudice, in other words, meet the second
13 prong, and even though it was not the result of a
14 tactical decision, but just they were too busy or,
15 in the heat of the battle, they had to make a
16 decision and then just made a bad decision, it
17 seems to me it would be a pretty rare case where
18 one would find that the conduct of trial counsel
19 fell within the range of reasonable options where
20 it was not a tactical decision intended to select
21 one strategy over another, and it was so serious
22 that it actually would change the outcome of the
23 case, which is the second prong of --
24 So I'm a little troubled by that idea
25 that somehow a decision of counsel, even though

1 not a tactical decision but simply just a decision
2 that wasn't made, could ever fall within the range
3 of reasonable alternative choices by capable trial
4 counsel if, in fact, the consequence of that
5 decision would change the outcome of the case in a
6 way adverse to their client.
7 I may be overstating it, but it just
8 seems to me there is a reason why we have both
9 prongs of Strickland, and one is to kind of
10 emphasize what are the, quote, important decisions
11 that really require counsel to look at them very
12 carefully and make sure they're making a proper --
13 if sometimes making tough choices between options
14 is part of a tactical approach to the case as
15 opposed to just saying, you know, "I didn't even
16 consider it."
17 I think that's when we really have to
18 shift more to a prejudice analysis, don't we?
19 MR. ANDERSON: Respectfully, Your Honor, I
20 disagree. I have found the language that I was
21 looking for from Strickland, where it talks about
22 Leavitt has the burden of showing counsel's
23 performance, quote, fell below an objective
24 standard of reasonableness.
25 And then if you look at Harrington, it

1 talks about how there are countless ways to
2 provide effective assistance of counsel and that
3 it's based upon, out of Richter, again, prevailing
4 professional norms.
5 And I know that Pinholster, Richter,
6 and even Strickland talked about how there are a
7 lot of burdens upon a defense attorney, and he has
8 to allocate his time and his resources. And
9 merely because an attorney doesn't make a
10 decision, oh, I should object to this instruction
11 or I shouldn't object to this instruction and I
12 should have a tactical reason one way or the other
13 isn't the deficient performance test. It's
14 whether that decision was objectively reasonable
15 based upon prevailing norms in that particular
16 area.
17 And I would submit that when you look
18 at the fact that, again, that the instruction was
19 normally used in eastern Idaho, and there are
20 federal -- were federal circuits at that time that
21 said there was nothing wrong with the instruction,
22 that there wouldn't have been deficient
23 performance, that it didn't matter which decision
24 counsel made. It was an objectively reasonable
25 decision not to make even a decision or not to

1 object, at least, to the instruction.
2 THE COURT: So if there is a decision that
3 inaccurately states the presumption of innocence
4 and unfairly undermines that, that could still
5 fall within the range of appropriate decisions of
6 counsel that would not run afoul of the first
7 prong of Strickland?
8 MR. ANDERSON: If that particular -- if that
9 particular instruction were being generally used
10 in that area and had, in fact, been approved by
11 other courts, it would not run afoul of
12 Strickland, Your Honor.
13 THE COURT: Well, approved or pass the smell
14 test? I mean, that -- that can be a little
15 different, I mean, saying we think it's a bad
16 instruction, but we don't find under the facts of
17 this case that it would have affected the jury's
18 decision.
19 MR. ANDERSON: I think either way,
20 Your Honor.
21 THE COURT: All right. And I'm not sure I
22 disagree with you. I just -- I find it mildly
23 troubling that we would allow trial counsel,
24 particularly in capital cases, to be given a pass
25 to ignore instructions that have been criticized

1 and at least not make an effort to keep the trial
2 court from giving that instruction where it might,
3 in fact, undermine the defense's case.
4 But I understand your point of view,
5 because it's clear that the Supreme Court, in
6 Strickland and its progeny, have been very
7 deferential to trial counsel's decision. I would
8 prefer to think that that deference is certainly
9 strongest where it's a tactical choice as opposed
10 to a nonchoice.
11 MR. ANDERSON: And that I do agree with,
12 Your Honor.
13 THE COURT: All right.
14 MR. ANDERSON: I'm simply saying you don't
15 have to have a, quote, tactical decision made that
16 was objectively reasonable to satisfy the first
17 prong. It's simply a question of whether it was
18 objectively reasonable.
19 THE COURT: All right.
20 MR. ANDERSON: Unless the court, Your Honor,
21 has additional questions, I would ask that the
22 motion be denied, Your Honor.
23 THE COURT: All right.
24 MR. ANDERSON: Thank you.
25 THE COURT: Very good.

1 Mr. Parnes or Mr. Nevin, a brief
2 response.
3 MR. PARNES: Briefly.
4 Your Honor, going to -- we haven't
5 touched -- only briefly -- on what the
6 post-conviction counsel did, but a lot -- we
7 believe that he didn't do very much.
8 He was appointed in -- apparently in
9 1986. The hearing was held in April of 1987. As
10 far as we know, there has been never any contact
11 with -- with any witnesses, any of the forensic
12 people. We don't know that Mr. Parmenter did any
13 work in preparation for the hearing.
14 And, in fact, the only -- he called the
15 old investigator in the case. He called
16 Mr. Leavitt. And so Mr. Leavitt said: Well,
17 I -- I wanted them to do X. I wanted them to do
18 Y. But he didn't ever develop independently
19 whether they had done certain investigations, what
20 those had related to, what the experts would have
21 shown. None of that was done.
22 And so what it became at that hearing
23 was simply just a -- well, Mr. Leavitt wanted
24 this, and that was it. And then he rested the
25 case.

1 And so there was ineffective assistance
2 of counsel in the post-conviction, so the issues
3 have never been developed. We have never had that
4 opportunity to put forth before the court what
5 Mr. Kohler was doing at the time, what Mr. Hart
6 was doing at the time.
7 We filed a motion on May 11th actually
8 believing up until then that the State might not
9 seek an immediate stay in this -- in this case,
10 and we have asked the court for permission to have
11 those things that we would have had developed back
12 in 1996 had the court not procedurally defaulted
13 this case.
14 And so what we're asking -- and I think
15 what Martinez does is say: Let's put us back in
16 that situation of substantial claims. And we have
17 acknowledged that we have dropped some of the
18 claims that were initially in the petition because
19 we felt they did not meet that standard. But the
20 ones that are left are significant, substantial
21 claims that we need to develop. And we need to
22 develop a time frame to do that. And that's what
23 we're asking the court to do, and that's what
24 Martinez suggested.
25 Now, in -- we cited -- there is a -- I

1 think it's the George Lopez case that was attached
2 where the case was remanded back to the district
3 court, not under -- under pressure of a warrant
4 that came into -- into place after we had filed a
5 motion. That's what I think the court has to look
6 at.
7 We filed the motion on May 11th. The
8 warrant was not sought until May 18th. So there
9 were proceedings going on in this court. We asked
10 for a stay. We asked the court actually to
11 suggest that the mandate be held up, that the
12 court remand it. And that's what they have done
13 in other cases.
14 And so now we're under the pressure of
15 an execution that's supposed to happen in 12 days,
16 and we're asking significant questions. And
17 Mr. Anderson is asking the court: Well, just
18 presume that Mr. Kohler did this. And if he
19 didn't see that there was no mixed blood in the
20 report, well, he must have had a reason for not
21 asking about that.
22 We don't know what that is. We just
23 want the time to develop it, and I think we're
24 entitled to it because these are substantial
25 claims, serious claims in a capital case.

1 And Mr. Nevin can address some of the
2 other issues.
3 THE COURT: All right.
4 MR. NEVIN: Your Honor, just at counsel's
5 suggestion that Rule 9.2(c) only applies when a
6 capital case begins and not as we are in the
7 present circumstances, but this capital case did
8 just begin.
9 I mean, in other words, here is
10 the -- we presented this claim to the court in
11 1992 and in 1993. In all good faith, it was
12 Claim 9, and we never got a chance to develop it.
13 I mean, literally, we didn't take Mr. Anderson's
14 deposition until 2006 -- I'm sorry --
15 THE COURT: You wish you could take
16 Mr. Anderson's deposition.
17 MR. NEVIN: Some day, Your Honor. Some day.
18 No.
19 Mr. Parmenter's deposition wasn't taken
20 until 2006. We didn't even question him on this
21 subject. We never got a chance to develop this.
22 So now to say -- and the court ruled
23 the way it did based on the law as it existed at
24 the time, and I understand that. I'm not
25 complaining about that. But now, because of the

1 procedural posture of the case, we're back in a
2 situation exactly what I predicted Mr. Anderson
3 would do. He is saying: We're not at the
4 beginning of this case anymore. We're at the
5 eleventh hour, and the court -- it would be
6 outrageous for the court to step in at this point,
7 et cetera, et cetera.
8 I mean, we just never got a chance to
9 develop these issues. We really are in the place
10 where 9.2 applies, and it's appropriate for the
11 court to -- I mean, as Mr. Anderson said, we went
12 and got the warrant when we did because there was
13 no stay in place, quote, unquote, in his argument
14 to the court just a few minutes ago.
15 So -- and, Your Honor, I -- so I do ask
16 the court issue the stay.
17 Just to return to the reasonable doubt
18 instructions for a minute and the issue of a
19 tactical choice, you know, you don't -- Strickland
20 speaks of a tactical choice, and the progenies
21 speak of a tactical choice.
22 Well, it can't be -- in other words,
23 that adjective got put on in front of the word
24 "choice." "Tactical" got placed there for a
25 reason, and the court has to assume it's there for

1 a purpose.
2 And I think what Mr. Anderson is asking
3 you to do is take away the term "tactical" and
4 just look at the choice. Was it a choice? But I
5 don't even think you can assume that when
6 you're -- when -- as he says, these are
7 boilerplate instructions is what he surmises from
8 the existence of these instructions being in three
9 separate capital cases from that era.
10 You cannot assume that this is a
11 tactical choice or even, for that matter, a
12 choice. And if you don't have a tactical choice,
13 then you do not -- there is no basis for forgiving
14 an incorrect decision, and there is no basis for
15 saying that an instruction which says that the
16 requirement for proof beyond a reasonable doubt
17 doesn't apply to somebody who is actually guilty.
18 There is just no basis. There is no tactical
19 reason for a defense lawyer to choose that.
20 THE COURT: Mr. Nevin, getting back to the
21 prejudice prong of that -- because, you know,
22 obviously, you know, you heard my discussion with
23 Mr. Anderson, and I have some concerns similar to
24 those you have expressed with regard to the
25 deficient performance prong. But with regard to

1 the prejudice prong, isn't the Rhoades decision,
2 which I think came down last year -- didn't that
3 give a pretty clear indication of what the -- what
4 the -- how the circuit would view the effect of
5 giving that instruction since they upheld, I
6 think, Mr. Rhoades's conviction in the face of a
7 challenge to that instruction?
8 It's not the same panel, but it's the
9 circuit.
10 MR. NEVIN: It's not the same panel, and
11 it's not the same case, and it's not the same set
12 of facts.
13 THE COURT: But the instructions were, as I
14 recall, very similar, if not the same.
15 MR. NEVIN: Yes. And I think, really, all I
16 can speak to based on my recollection is that
17 Instruction 12 was present in that case as well.
18 And I would love to have the
19 opportunity, Your Honor, after addressing that
20 case and reviewing all the facts of that case, to
21 address the question of whether Mr. Leavitt's case
22 presents a similar factual picture for that jury
23 in the jury room and how that would compare to
24 what the jury in Mr. Rhoades's case was looking
25 at. That's one of the things we would do if we

1 were given an opportunity to argue this.
2 And I think it's -- I mean, I don't
3 know -- I assume the court would look at that
4 question and would look at it carefully as opposed
5 to -- as opposed to simply looking at a remark
6 that was made in the Rhoades case. You know, I
7 think it deserves a careful analysis of whether
8 Rhoades's and Leavitt's factual development at the
9 point of the case being submitted to the jury were
10 the same. And I don't know that the Ninth Circuit
11 would come to the same conclusion.
12 THE COURT: Okay.
13 MR. NEVIN: Thank you, Your Honor.
14 THE COURT: Thank you, Mr. Nevin.
15 Counsel, as I have indicated, I -- it's
16 somewhat interesting. It's hard to believe, but
17 I'm coming up on 17 years on the federal bench.
18 When I first came on the court, I felt strongly
19 that one thing that needed to happen is to ensure
20 that, certainly with regard to death penalty
21 cases, that we give them very serious attention
22 both in terms of, you know, the thoughtfulness of
23 our decisions but, equally important, that we try
24 to be as prompt as possible.
25 Of course, you know, 17 years later,

1 it's pretty clear that the very process itself
2 simply is very slow and ponderous and perhaps
3 unavoidably so.
4 But I think, in a case like this, I
5 think it is imperative that we get out a very
6 quick decision. We're working on it as we speak,
7 and we will have a decision out either later this
8 afternoon or perhaps Monday morning.
9 Where it goes from there, you know, I'm
10 assuming that you're both poised to perhaps seek
11 some type of emergency appeal to the circuit
12 regardless of what -- who is the winner or loser
13 on this.
14 I think Martinez did, of course, raise
15 some issues. It doesn't surprise me,
16 Mr. Anderson, that you are getting bombarded with
17 all kinds of claims that the ineffective
18 assistance of counsel at trial claims that were
19 procedurally defaulted in some fashion are now,
20 perhaps in the eyes of defense counsel and the
21 petitioner, now alive and well. You know, I think
22 that's all got to be played out a little more
23 before we'll know for sure what the effect is of
24 Martinez.
25 But, regardless, we will try to get a

1 decision out very quickly and see where we go from
2 there.
3 Again, Counsel, I very much appreciate
4 the quality of the briefing, the argument, which
5 is, as always, first-rate. But this is a very
6 serious matter, obviously, and we'll get a
7 decision out as soon as we can.
8 We'll be in recess.
9 (Proceedings concluded at 11:24 a.m.)
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1 R E P O R T E R' S C E R T I F I C A T E

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5 I, Tamara I. Hohenleitner, Official

6 Court Reporter, State of Idaho, do hereby certify:

7 That I am the reporter who transcribed

8 the proceedings had in the above-entitled action

9 in machine shorthand and thereafter the same was

10 reduced into typewriting under my direct

11 supervision; and

12 That the foregoing transcript contains a

13 full, true, and accurate record of the proceedings

14 had in the above and foregoing cause.

15 IN WITNESS WHEREOF, I have hereunto set

16 my hand June 1, 2012.

17

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Tamara I. Hohenleitner

21 Official Court Reporter

CSR No. 619

22

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