NO. 12-35450

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD A. LEAVITT,

Petitioner-Appellant,

v.

A.J. ARAVE,

Respondent-Appellee.

Appeal From the United States District Court
In the District of Idaho,
The Honorable B. Lynn Winmill, Presiding

RESPONDENT-APPELLEE'S ANSWERING BRIEF

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STATEMENT OF JURISDICTION

Petitioner-Appellee Richard A. Leavitt ("Leavitt") filed his initial Petition for Writ of Habeas Corpus on April 29, 1993 (Dkt. 13),[1] which was amended on February 20, 1996 (E.R., Vol.2, pp.292-333). The district court had jurisdiction pursuant to 28 U.S.C. § 2254. Leavitt v. Arave ("Leavitt III"), 383 F.3d 809, 815 (9th Cir. 2004).

This Court has twice reviewed Leavitt's case. Id.; Leavitt v. Arave ("Leavitt IV"), 646 F.3d 605 (9th Cir. 2011). After this Court concluded his resentencing counsel was not ineffective in Leavitt III, 646 F.3d 605, Leavitt filed a Petition for Certiorari, which was denied May 14, 2012, Leavitt v. Arave, 2012 WL 509134 (2012). While his petition was pending, on May 11, 2012, Leavitt filed his instant Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b) Motion") (S.E.R., pp.21-34). Because one of the claims raised in his Rule 60(b) Motion constitutes a "successive claim," the district court was without jurisdiction to address the merits of that claim.

[1] The following references are used in this brief: "Dkt." refers to the federal clerk's record as referenced on the docket sheet which is included in Leavitt's Excerpts of Record (E.R., Vol.3, pp.700-27); "E.R." refers to the Petitioner-Appellant's Excerpts of Record; "S.E.R." refers to the state's Excerpts of Record; "P.O.B." refers to Leavitt's opening brief.

Leavitt's appeal is timely, Fed. R. App. P. 4(a)(4), and this Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(c). Leavitt III, 383 F.3d at 815; Delay v. Gordon, 475 F.3d 1039, 1041 (9th Cir. 2007).

STATEMENT OF ISSUES

Leavitt has not stated an issue for appeal. The state wishes to phrase the issue as follows:

Has Leavitt failed to establish the district court abused its discretion by denying his Rule 60(b) motion because he failed to raise a "substantial" claim of ineffective assistance of trial counsel as required under Martinez v. Ryan, and failed to establish post-conviction counsel was ineffective?

STATEMENT OF THE CASE

Nature Of The Case

This capital case stems from Leavitt's appeal of the district court's Memorandum Decision and Order (E.R., Vol.1, pp.2-38) denying his Rule 60(b) Motion in which Leavitt relies upon Martinez v. Ryan, --- U.S. ---, 132 S.Ct. 1309 (2012), to reopen his case (S.E.R., pp.---).

Course Of Proceedings, Statement Of Facts And Disposition

Because of the time constraints associated with this appeal and this Court's request for "abbreviated briefs," the state will rely upon the prior

decisions of the respective courts that have addressed Leavitt's conviction for the first-degree murder of Danette Elg and imposition of the death penalty, particularly the district court's Memorandum Decision and Order denying Leavitt's Rule (60)(b) Motion. (E.R., Vol.1, pp. 2-38); State v. Leavitt (Leavitt I), 775 P.2d 599, 601-02 (Idaho 1989); State v. Leavitt (Leavitt II), 822 P.2d 523, 524 (Idaho 1991); Leavitt III, 383 F.3d 809; Leavitt IV, 646 F.3d 605.

STANDARD OF REVIEW

The standard of review of the district court's Memorandum Decision and Order denying Leavitt's Rule 60(b) Motion is an abuse of discretion. Delay, 475 F.3d at 1043. As explained by this Court:

> The judgment below must be affirmed unless (1) we have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors, (2) the district court applied the wrong law, or (3) the district court rested its decision on clearly erroneous findings of fact.

Id. (internal quotations and citation omitted). The standard is "difficult to meet under any circumstances." United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1175 (9th Cir. 2010).

ARGUMENT

The District Court Did Not Abuse Its Discretion By Denying Leavitt's Rule 60(b) Motion

A. Introduction

The district court declined to apply the factors a court may consider when assessing whether Martinez justifies reopening a habeas case, *see* Lopez v. Ryan, 2012 WL 1676696 (9th Cir. 2012), but "assume[d] that most of those factors weigh in favor of at least reaching Leavitt's argument for reconsideration based on the change in the law." (E.R., Vol.1, p.17.) However, the district court also concluded Leavitt's ineffective assistance of trial counsel claims are not "substantial" and he failed to establish post-conviction counsel was ineffective, resulting in a denial of relief including further evidentiary development. (Id., pp.20-37.)

Leavitt contends the district court abused its discretion "both in the procedures applied to this case as well as the consideration of the merits" because the court "improperly decided the merits of the case without providing [him] an opportunity to develop the record" and "making speculative conclusions about the performance of both PCR and trial counsel." (P.O.B., pp.1-2.) Specifically, Leavitt challenges the court's decision regarding four ineffective assistance of trial counsel claims: (1)

failing to challenge the forensic serology evidence; (2) failing to object to jury instructions, specifically Instruction 12; (3) failing to object to the prosecutor's closing argument; and (4) failing to object to testimony regarding an unrelated sexual encounter involving a knife. (P.O.B., pp.2-20.)

The district court's decision is protected by a number of principles of law. First, Leavitt has failed to establish any one of his ineffective assistance of trial counsel claims is "substantial" as required under Martinez, and that trial counsel was ineffective under the deferential standard of Strickland v. Washington, 466 U.S. 668 (1984). Second, he has failed to establish that post-conviction counsel was ineffective for not raising the four ineffective assistance of trial counsel claims. Finally, he has failed to meet the "difficult" task of establishing the district court abused its discretion by denying his Rule 60(b) Motion.

B. Leavitt's Claims Of Ineffective Assistance Of Trial Counsel Are Not Substantial

As the Supreme Court explained, "To overcome the default, [Leavitt] must also demonstrate that the underlying ineffective-assistance-of-counsel claim is a **substantial** one, which is to say that the prisoner must demonstrate that it has some merit." Martinez, 132 S.Ct. at 1318 (emphasis

added). "Thus, *Martinez* requires that a petitioner's claim of cause for a procedural default be rooted in 'a potential legitimate claim of ineffective assistance of trial counsel.'" Lopez, 2012 WL 1676696, *6 (quoting Martinez, 132 S.Ct. at 1318). As recently explained in Sexton v. Cozner, 2012 WL 1760304, *7 (9th Cir. 2012), "If trial counsel was not ineffective, then [Leavitt] would not be able to show that PCR counsel's failure to raise claims of ineffective assistance of trial counsel was such a serious error that PCR counsel 'was not functioning as the counsel guaranteed' by the Sixth Amendment." Leavitt has failed to meet that burden with respect to his substantive ineffective assistance of trial counsel claims because he has not demonstrated deficient performance nor prejudice as required under Strickland v. Washington, 466 U.S. 668 (1984).

1. Standards Of Law Regarding Ineffective Assistance Of Counsel

Ineffective assistance of counsel claims are governed by Strickland. The purpose of effective assistance of counsel "is not to improve on the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial." Cullen v. Pinholster, --- U.S. ---, 131 S.Ct. 1388, 1403 (2011) (quoting Strickland, 466 U.S. at 689). To prevail on a claim of ineffective assistance of counsel, Leavitt must show his counsels'

representation was deficient and that the deficiency was prejudicial. Strickland, 466 U.S. at 687.

The first element "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. In making this determination, there is a strong presumption that counsel's performance fell within the "wide range of professional assistance." Id. at 689; *see also* Sexton, 2012 WL 1760304, *7 (quoting Strickland, 466 U.S. at 739 ("We strongly presume 'that counsel's representation was within the wide range of reasonable professional assistance'"). Leavitt has the burden of showing counsel's performance "fell below an objective standard of reasonableness." Id. at 688. The effectiveness of counsel's performance must be evaluated from his perspective at the time of the alleged error, not with twenty-twenty hindsight. Id. at 689. "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." Harrington v. Richter, --- U.S. ---, 131 S.Ct. 770, 788 (2011) (internal quotations and citation omitted). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland,

466 U.S. at 689. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Richter, 131 S.Ct. at 788 (internal quotations and citation omitted).

Strategic and tactical choices are "virtually unchallengeable" if made after thorough investigation of the law and facts. Strickland, 466 U.S. at 690-91. Strategic choices made after less than complete investigation are unchallengeable if "reasonable professional judgments support the limitations on investigation." Id. "Rare are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to any one technique or approach." Richter, 131 S.Ct. at 789 (quotations and citation omitted). Counsel is permitted to formulate a strategy that was reasonable at the time and "balance limited resources in accord with effective trial tactics and strategies." Id.

In Strickland, the Court also discussed counsel's duty to conduct a "reasonable investigation," which does not mandate an "exhaustive investigation." As explained by the Supreme Court, "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for

reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. As explained in Burger v. Kemp, 483 U.S. 776, 794 (1987) (quoting United States v. Cronic, 466 U.S. 648, 665 n.38 (1984)), merely because counsel "could . . . have made a more thorough investigation than he did," does not mandate relief because the courts "address not what is prudent or appropriate, but only what is constitutionally compelled." Therefore, counsel is not required to "mount an all-out investigation into petitioner's background." This principle was reaffirmed in Rompilla v. Beard, 545 U.S. 374, 383 (2005), where the Court reiterated, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." As explained in Babbitt v. Calderon, 151 F.3d 1170, 1173-74 (9th Cir. 1998) (internal citations and quotations omitted) (emphasis added), "While a lawyer is under a duty to make reasonable investigations, a lawyer may make a reasonable decision that particular investigations are unnecessary. To determine the reasonableness of a decision not to investigate, the court must apply **a heavy measure of deference** to counsel's judgments."

The second element requires Leavitt to show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This requires Leavitt to demonstrate "a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," id. at 694, which "requires a substantial, not just conceivable, likelihood of a different result," Pinholster, 131 S.Ct. at 1403 (internal quotations and citation omitted). A reviewing court "must consider the totality of the evidence before the judge or jury," Strickland, 466 U.S. at 695, and reweigh that evidence "against the totality of available mitigating evidence," Pinholster, 131 S.Ct. at 1408 (quoting Wiggins v. Smith, 539 U.S. 510, 534 (2003)).

Overcoming Strickland's "high bar is never an easy task." Padilla v. Kentucky, 559 U.S. ---, 130 S.Ct. 1473, 1485 (2010). Because ineffective assistance of counsel claims provide a means to raise issues not presented at trial, the Strickland standard "must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve." Richter, 131 S.Ct. at 788 (internal quotations and citation omitted). The reviewing court need not

address both prongs of Strickland if an insufficient showing is made under only one prong. Strickland, 466 U.S. at 697.

2. Serology Evidence

The entirety of Leavitt's claim regarding trial counsels' alleged failure to challenge the blood evidence reads as follows: "Trial counsel failed . . . to counter the forensic serology evidence introduced by the state." (E.R., Vol.2, p.23, ¶70.) Not only does Leavitt fail to explain how trial counsel failed to counter the blood evidence, but he has regularly refused to acknowledge that trial counsel consulted with a forensic expert and that trial counsel made a strategic decision not to have the expert testify because most of his conclusions were in harmony with the state expert's conclusions.

On appeal, Leavitt's primary complaint stems from the district court's decision that post-conviction counsel was not ineffective in declining to raise this claim during post-conviction proceedings. (P.O.B., pp.2-6.) However, this claim was raised during post-conviction proceedings, particularly during the evidentiary hearing when trial counsel was questioned regarding retention of Dr. Ed Blake, who "analyzed a lot of the blood samples that were also analyzed by Ann Bradley for the State. For the most part his findings were consistent with those of Ann Bradley." (E.R.,

Vol.3, pp.541-42.) During post-conviction proceedings, Jay Kohler, one of Leavitt's trial attorneys, discussed Dr. Blake's involvement:

> Most importantly with respect to the major evidentiary items, the shorts, the sheet, the blood samples from these items, and other items, his analysis was completely consistent with that of Ann Bradley. Because of that we simply felt that he really had nothing to offer as far as rebutting the testimony of Ann Bradley. In fact, we felt that he would perhaps, in the eyes of the jury, tend to corroborate the findings of Ann Bradley.
>
> In addition to his report I might add that I did have several phone conversations with him. I suppose the ledger would reflect the dates and times of those phone conferences. In those conferences he also indicated that he didn't feel like he could say anything that would rebutt [sic] Ann Bradley's conclusions.

(Id., p.542.) After consulting with other attorneys, a tactical decision was made by Leavitt's attorneys to not have Dr. Blake testify because "it would emphasize the strongest part of the State's case." (Id., p.543.) Even during cross-examination, Kohler reaffirmed Dr. Blake's qualifications and that there was not "any difference at all between what he was saying and what Ann Bradley was saying" "with respect to his testing of the shirt, pillowcase, [and] panty shorts." (Id., p.553.) And while Kohler could not "specifically recall" some years after Leavitt's trial, the following sentence - "A week A antigen **may** result from thin smears of blood overlying the type O blood" - he explained, "we did review his entire report with him. I assume that we did" review that sentence with Dr. Blake. (Id., pp. 554-55) (emphasis

added). As recognized by the district court, "The choice of what type of expert to use is one of trial strategy and deserves a 'heavy measure of deference.'" Turner v. Calderon, 281 F.3d 851, 876 (9th Cir. 2002) (citing Strickland, 466 U.S. at 691). In light of the fact that Leavitt's trial attorneys believed that having Dr. Blake testify "would emphasize the strongest part of the State's case" (E.R., Vol.3, p.543), it was little wonder they chose as a matter of strategy not to have him testify, but challenged the state's forensic evidence by cross-examining the state's expert (id., pp. 628-37). Undoubtedly, had trial counsel called Dr. Blake to testify, which would have corroborated most of Ann Bradley's testimony regarding the blood evidence, Leavitt would be contending trial counsel was ineffective for having Dr. Blake testify and "emphasiz[ing] the strongest part of the State's case." (Id., p.543.) It is for this very reason that strategic decisions should not be second-guessed, particularly in federal habeas where "post-trial inquiry threaten[s] the integrity of the very adversary process the right to counsel is meant to serve." Richter, 131 S.Ct. at 788.

As a result of Kohler's testimony, it was little wonder that in Leavitt III, this Court concluded Leavitt's claim challenging his trial counsels' failure to call Dr. Blake was not deficient because "trial counsel's tactical decisions cannot form the basis for an ineffective assistance claim." 383

F.3d at 840 n.40 (citing Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001)). Leavitt contends this Court is not bound by its prior decision because it is not "law of the case" and the claim was procedurally defaulted since it allegedly was not raised before the Idaho Supreme Court. (P.O.B., pp.6-8.) In Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir. 1995), this Court discussed the "law of the case" doctrine and its applicability to another panel on appeal:

> Under the law of the case doctrine, one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case. Although an appellate panel's observance of the doctrine is discretionary, 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.

Merely contending, "[w]hatever the application of the law of the case doctrine to the district [court,] it is clear that it applies differently to this Court" (P.O.B., pp.6-7), Leavitt fails to explain how he has overcome the test detailed in Hegler. Based upon Kohler's post-conviction testimony, this Court's decision was not even erroneous, let alone "clearly erroneous" such that "its enforcement would work a manifest injustice. While Martinez is certainly "intervening" authority, it is not "controlling authority" that mandates reconsideration of an ineffective assistance of trial counsel claim

that was rejected on the merits in a previous decision by this Court. Rather, Martinez merely provides authority for cause to overcome an ineffective assistance of trial counsel claim that is procedurally defaulted based upon the ineffective assistance of post-conviction counsel; it does not change the Strickland requirement that mandates Leavitt establish both deficient performance and prejudice.

Likewise, there is no merit to Leavitt's contention that this Court's decision regarding the blood evidence was "plainly erroneous" because it was allegedly procedurally defaulted since this Court can clearly address the merits of a claim irrespective of whether it is allegedly procedurally defaulted. *See* Lambrix v. Singletary, 520 U.S. 518, 524-25 (1997) (noting that courts can deny relief on the merits despite a procedural default); Walters v. Maass, 45 F.3d 1355, 1360 n.6 (9th Cir. 1995) ("because Walter's claim fails on the merits, the interest of comity and judicial efficiency are better served by addressing the claim on the merits"); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir.2002) ("[A]ppeals courts are empowered to, and in some cases should, reach the merits of habeas petitions if they are, on their face and without regard to any facts that could be developed below, clearly not meritorious despite an asserted procedural bar.").

Further, there is no merit to Leavitt's contention that this claim was not decided by this Court under the *de novo* standard of review, which, even under pre-AEDPA standards, allows a habeas court to reject a claim based upon the record before the state court without an evidentiary hearing, particularly when no additional evidence to support the claim has been presented to any court. *See* Rhoades v. Henry, 611 F.3d 1133, 1142 (9th Cir. 2010) ("Rhoades's assertion that he was entitled to an evidentiary hearing is unsupported by argument. Not only does this waive the issue, but Rhoades points to no additional evidence that would be presented if one were held. We will not find an abuse of discretion in these circumstances.").

Finally, focusing upon the importance of the blood evidence and the alleged distinction between whether the blood was "mixed" or "overlaid," Leavitt contends he has established prejudice because he is "entitled to have adequate time and resources to develop fully [the evidence], rather than having it resolved in summary fashion on the merits." (P.O.B., pp.8-11.) The district court recognized Leavitt is grasping at straws by explaining:

> At the post-conviction hearing, Kohler read a portion of Blake's report, in which Blake noted that "[a] weak A antigen **may** result from thin smears of A blood overlying the Type O blood." (State's Lodging B-2, pp.166-67.) At most, then, Blake's report suggested that Elg's presumed blood may have overlaid Leavitt's presumed blood because of the "weak A antigen" response, but even if that theory were correct, Leavitt has pointed to no other evidence tending to show that a

> significant amount of time must have elapsed between the deposit of the two blood types on the clothing.
>
> The Court does not share Leavitt's interpretation of the record that "the evidence regarding the shorts was the sole item on which the state based its argument that Leavitt deposited the blood at the time of the killing." (Dkt 344.) Also relevant was the serious cut to Leavitt's finger, for which he received medical treatment on or about the same night that Elg was believed to have been killed, and Leavitt's shifting versions about the source of that cut. The evolving nature of the "nosebleed" story itself was probative of his obfuscation on this issue: at first, he had no explanation for why his blood would be found at the crime scene, and he did not reveal until trial, after it was clear that the State had incriminating serological evidence, what would seem to be the very relevant information that he had a nosebleed in Elg's bedroom the week before she was killed. *See Leavitt III*, 383 F.3d at 815.

(E.R., pp.30-31) (emphasis added).

Leavitt's contention that the finger cut and changing stories "only made it *possible* that Leavitt's blood was deposited at the time of the killing – it did not make it *definite*" (P.O.B., p.11) (emphasis in original), misses the mark; the state is not required to demonstrate any level of definiteness. Rather, Leavitt must establish that presentation of Dr. Blake's testimony - which corroborated the vast majority of the state expert's testimony - would have resulted in a "reasonable probability" that "undermine[s] confidence in the outcome" of the trial, Strickland, 466 U.S. at 604, that "requires a substantial, not just conceivable, likelihood of a different result," Pinholster, 131 S.Ct. at 1403. A single snippet, read from a report during cross-

examination, that includes the word "may" is simply insufficient to establish the requisite prejudice. *See* Leavitt IV, 646 F.3d at 614 (speculative expert opinions are "not entitled to significant weight"); Rhoades v. Henry, 638 F.3d 1027, 1050 (9th Cir. 2011) (finding no prejudice where expert reports "talk in terms of conditions that [the defendant] 'likely' has or 'may' have").

The state certainly does not dispute the importance of the blood evidence. However, Leavitt has failed to establish trial counsel was ineffective by making a strategic decision to not have Dr. Blake testify, and Leavitt has certainly failed to establish having Dr. Blake testify regarding something that "may" exist would have changed the outcome of Leavitt's trial, particularly since the bulk of Dr. Blake's testimony would have corroborated the state expert's testimony.

3. Jury Instructions

The district court initially concluded Leavitt is attempting to broaden the scope of his ineffective assistance of trial counsel claim by contending trial counsel was ineffective for not objecting to various jury instructions, and that "a stand-alone Sixth Amendment trial counsel claim on this basis has never been raised." (E.R., Vol.1, pp.34-35.) Leavitt contends, "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." (P.O.B., p.11.) However, Leavitt fails to follow the history of this claim as it was described by the district court, which includes its construction of the claim as an ineffective assistance of appellate counsel claim (E.R. Vol.1, pp.178-79), rejection of Leavitt's attempt to reserve the right to identify other grounds to support the claim (id., p.178 n 7), Leavitt's failure to seek reconsideration of the court's order on anything but appellate counsel (Dkts. 66, 67), and that his proposed amendment to clarify that portion of his claim focused only on appellate counsel (Dkt. 66, p.3). Based upon the history of the claim and Leavitt's failure to clarify that it included a claim regarding trial counsel, the district court did not abuse its discretion by concluding he is seeking to expand his claim beyond what is alleged in his Amended Petition.

Moreover, reliance upon Leavitt's Traverse is misplaced. Not only does that portion of his Traverse involve Claim 11 (E.R., Vol.2, p.232), but claims cannot be raised or amended in a traverse; claims must be raised in the actual or amended petition. As explained in Cacoperdo v. Demosthenes, 37 F.3d 504, 507(9th Cir. 1994), "A Traverse is not the proper pleading to raise additional grounds for relief. In order for the State to be properly

advised of additional claims, they should be presented in an amended petition or, as ordered in this case, in a statement of additional grounds. Then the State can answer and the action can proceed."

Moreover, even if such a claim can be scoured from Leavitt's Amended Petition, as recognized by the district court, even though it previously found constitutional error, "the claim otherwise lacks substantial merit" because "much water has flowed under the bridge since that decision." (E.R., Vol.1, p.35.) "Direct[ing] the Court's attention to the instructions themselves," Leavitt contends, "[c]onsidered individually and as a whole[,] the six reasonable doubt and presumption of innocence instructions essentially eliminated the presumption of innocence and the requisite for proof beyond a reasonable doubt," particularly Instruction 12. (P.O.B., p.13.) While Leavitt correctly notes this Court addressed Instruction 12 under the retroactivity doctrine of Teague v. Lane, 489 U.S. 288 (1989), *see* Leavitt III, 383 F.3d at 816-821, he is simply mistaken that the other instructions were not addressed on the merits. After addressing the state's Teague argument, the Court noted:

> Even so, Leavitt contends that the other reasonable doubt instructions were themselves fraught with error, such that they could not undo the misleading impression left by instruction 12. In particular, he faults instructions 10, 11, 13, 36, and 39, which

> he claims (and the district court concluded) were confusing, ambiguous, and possibly misleading to the jury.

Leavitt III, 383 F.3d at 821 (footnote omitted).

This Court rejected Leavitt's challenge to each of the instructions on the merits. Addressing the trial court's misstatement to the jury regarding Instruction 10, this Court explained any alleged error by initially using the word "should" was "immediately cured" by the rest of the instruction. Leavitt III, 383 F.3d at 822; *see also* Johnson v. Texas, 509 U.S. 350, 367 (1993) ("In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would - with a commonsense understanding of the instructions in the light of all that has taken place at the trial"). As to Instruction 11, this Court recognized that in Victor v. Nebraska, 511 U.S. 1, 16 (1994), the Supreme Court affirmed the use of "moral certainty" language, concluding, "We do not think it reasonably likely that the jury understood the words 'moral certainty' either as suggesting a standard of proof lower than due process requires or as allowing conviction on factors other than the government's proof." Leavitt III, 383 F.3d at 822. Addressing Instruction 13, this Court explained, "Instruction 13 is and always has been a perfectly correct statement of the law; 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." Id. at 822 (emphasis in original) (citing Harris v. United States, 536 U.S. 545, 549 (2002)). This Court also concluded, "[I]nstruction 36 would not have left jurors confused about their duty to acquit if they entertained a doubt that was *reasonable* rather than derived from 'fanciful suppositions' or 'remote conjectures as to possible . . . facts different from those established by the evidence.'" Id. at 822 (emphasis in original) (citing Victor, 511 U.S. at 5). As to Instruction 39, this Court explained it was "not reasonably likely that this jury did misunderstand the burden of proof or that instruction 39 contributed to any confusion about the burden of proof required to convict" because "Instruction 39 did not impose any burden upon Leavitt himself to persuade the jury that he was not present beyond a reasonable doubt, or by a preponderance of the evidence" and, "for all practical purposes, there was no alibi." Id. at 823 (emphasis omitted).

Admittedly, it appears the court did not expressly address the merits of Instruction 12 because the claim was barred under Teague v. Lane, 489 U.S. 288 (1989). However, in Rhoades v. Henry, 638 F.3d 1027, 1043-45 (9th Cir. 2011), this Court examined an identical "presumption of innocence" instruction and, while recognizing such instructions are "disfavored," concluded there was "no reasonable probability the jury did not understand

they must apply the presumption of innocence and the reasonable doubt standard" when the instruction was read together with the other instructions.

The same is true with Leavitt's case. As this Court explained, "There are nine different instructions that state the burden of proof correctly: including instructions 10 and 11 (notwithstanding Leavitt's challenge to some of the wording), 24, 25, 28, 32, 33, 35, and 44. In addition, three instructions made clear that the decision to convict must be based on evidence adduced at trial: one unnumbered preliminary instruction and instructions 6 and 16." Leavitt III, 383 F.3d at 818 n.3 (quoting instructions).

Additionally, Leavitt's attempt to distinguish Rhoades is unavailing. While it is true Rhoades does not reveal "exactly what instructions were being considered in the case" (P.O.B., p.15), this Court did quote Instruction 16, which is not unconstitutional, and Instruction 27, which also is not unconstitutional, and concluded, "that read together, the instructions overall resolved any ambiguity in Instruction 17, thereby leaving no reasonable probability the jury did not understand they must apply the presumption of innocence and the reasonable doubt standard to Rhoades's case." Id. 383 F.3d at 1042-45 (footnotes omitted). In light of all the other instructions reviewed in Leavitt III, 383 F.3d at 821-23, Leavitt's argument fails.

The same is true regarding the "alibi instruction." While this Court recognized it was "clearly wrong," "it is not reasonably likely that this instruction, as part of the package of instructions, caused Leavitt's jury to base his conviction on a degree of proof below that required by the Due Process Clause." Leavitt III, 383 F.3d at 822. As this Court explained, "Instruction 39 by its terms pertained only to the alibi defense; the jury was otherwise clearly instructed that the prosecution had the burden of proving that Leavitt committed murder beyond a reasonable doubt, and that the law never imposes upon a Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence." Id. (internal quotations omitted). In light of the fact this Court concluded the instruction was not erroneous in Leavitt's case, it is irrelevant whether such an instruction existed in Rhoades.

Moreover, as explained in Leavitt III, 383 F.3d at 820, even as late as 1989 (Leavitt was convicted in 1985), "[o]ther federal courts of appeals had considered similar instruction, but no consensus had emerged." State courts were likewise split in 1989. Id. In light of the fact "the state courts of Idaho were (and are) not bound to follow Ninth Circuit law," id. at 819, it is difficult to understand how trial counsels' failure to object to Instruction 12 was deficient such that it "fell below an objective standard of

reasonableness," Strickland, 466 U.S. at 688, when the instruction was being utilized in other jurisdictions. Irrespective, based upon Leavitt III and Rhoades, Leavitt has failed to establish both deficient performance and prejudice when trial counsel failed to object to Instruction 12. Therefore, he cannot establish a "substantial" claim under Martinez that warrants reconsideration of Claim 9.

4. Prosecutor's Closing Argument

Leavitt contends, "There is simply no tactical or strategic reason for trial counsel's failure to object to these instances of prosecutorial misconduct." (P.O.B., p.18.) However, it is Leavitt's burden to overcome the presumption that counsels' failure to object was strategic. *See* Paradis v. Arave, 954 F.2d 1483, 1494 (9th Cir. 1992), *vacated on other grounds*, 507 U.S. 1026 (1993) (there is a presumption that failing to object to a prosecutor's closing argument is "sound trial strategy"). As explained in United States v. Molina, 934 F.2d 1440, 1448 (9th Cir. 1991), "From a strategic perspective . . . many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality."

Moreover, like many of Leavitt's ineffective assistance of counsel claims, this Court addressed this claim in the context of a substantive due process violation. Discussing the prosecutor's questions regarding Leavitt's Fifth Amendment right to remain silent, this Court concluded the questions were admissible because Leavitt did not remain silent and, therefore, the prosecutor was permitted to point out inconsistencies. Leavitt III, 383 F.3d at 827. The Court also concluded any questions regarding the "special inquiry" were harmless. Id. at 828. Addressing the prosecutor's closing arguments regarding the "link-in-the-chain," this Court explained that while the argument is "wholly undesirable, we cannot say that it alone – and it does essentially stand alone – is enough to result in a determination that the trial was so infected with unfairness as to be a denial of due process." Id. at 834. More importantly, this Court recognized, "the whole record of this case – the strength of the evidence and the paucity of error – assures us that this deviation from propriety was not enough to make any difference in the result." Id.

These substantive due process claims were unsuccessful and Leavitt cannot succeed by merely repackaging them as ineffective assistance of trial counsel claims. *See* Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005) "the merits of the coercion claim control the resolution of the *Strickland*

claim because trial counsel cannot have been ineffective for failing to raise a meritless objection"). Because the claims fail on their merits, they also fail Martinez's substantive claim test.

5. Failing To Move For Exclusion Of Evidence

In his fifth ineffective assistance of trial counsel claim, Leavitt contended trial counsel should have moved to exclude the testimony that he "had a knife while engaging in consensual sexual intercourse with a woman and the improper cross-examination of Petitioner by the prosecution." (E.R., Vol.2, p.34, ¶72.) Because of the conclusory nature of this claim – Leavitt has not even identified what woman he had consensual intercourse with that involved the use of a knife – his claim fails. *See* James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) ("conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief").

Not only did this Court address this issue in the context of the Fourth Amendment, Leavitt III, 383 F.3d at 828 n.16, it was also addressed in the context of due process with the Court concluding evidence of the knife was relevant to identifying the killer and even if there was error, it was harmless. Id. at 829. In light of this Court's decision, Leavitt cannot demonstrate either deficient performance or prejudice. Moreover, based upon the other "knife evidence" that was admitted at trial, it is likely trial counsel tactically

chose not to object to this evidence and highlight it before the jury. Based upon the presumption that it was a tactical decision not to challenge this evidence, particularly in light of the trial court's other rulings regarding knife evidence, Leavitt cannot establish deficient performance. Irrespective, Leavitt cannot establish prejudice, particularly in light of the other "knife evidence" that was presented to the jury and the overall strength of the state's case. Exclusion of the testimony simply would not have changed the outcome of Leavitt's trial because he was convicted based upon the forensic evidence and his repeated lies, not *de minimus* testimony regarding a prior sexual encounter.

C. Leavitt Has Failed To Establish Post-Conviction Counsel's Performance Was Ineffective Under *Strickland*

Addressing ineffective assistance of post-conviction counsel, the Supreme Court explained, "When faced with the question whether there is cause for an apparent default, a State may answer . . . that the attorney in the initial-review collateral proceeding did not perform below constitutional standards." Martinez, 132 S.Ct. at 1319. While the Court did not provide extensive guidance regarding the standards associated with ineffective assistance of post-conviction counsel, it is clear the two-prong test from Strickland guides post-conviction counsel's performance. Martinez, 132

S.Ct. at 1318. However, as further explained in Sexton, 2012 WL 1760304, *5 (citing Knowles v. Mirzayance, 556 U.S. 111, 127 (2009)), post-conviction counsel "is not necessarily ineffective for failing to raise even a nonfrivolous claim," let alone a claim that is meritless. In other words, the standard for ineffective assistance of post-conviction counsel is analogous to the standard for ineffective assistance of appellate counsel, where there is clearly a Sixth Amendment right to effective assistance of counsel but no obligation to raise every nonfrivolous claim. Jones v. Barnes, 463 U.S. 745, 751-52 (1983). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. Addressing the Strickland test, the Ninth Circuit has explained:

> These two prongs partially overlap when evaluating the performance of appellate counsel. In many instances appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. . . . Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason – because she declined to raise a weak issue.

Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1984) (internal quotations and citations omitted). Based upon these standards, while it is still possible to raise ineffective assistance of appellate counsel claims, "it is difficult to

demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259, 288 (2000).

After addressing the work Leavitt's attorney did during post-conviction proceedings (E.R., Vol.1, pp.21-22), the district court recognized that "the hallmark of effective advocacy" involves "the process of eliminating weaker arguments." (Id., p.23) (citing Smith v. Murray, 477 U.S. 527, 535 (1986)). The Supreme Court has recognized, "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 8 (2003).

Based upon the tactical decisions associated with raising claims in post-conviction proceedings, it is reasonable to assume the standards associated with raising claims on appeal also apply to post-conviction counsel. Irrespective, it is clear Leavitt's post-conviction counsel made strategic choices regarding which claims should be raised. Moreover, even if there was deficient performance during post-conviction proceedings or on appeal stemming from counsel's decision to raise other post-conviction claims, because, as detailed above, none of the ineffective assistance of trial counsel claims are substantial, there was no prejudice as a result of any alleged deficiencies by post-conviction counsel.

CONCLUSION

Leavitt has failed to establish any basis for this Court to reverse the district court or for this case to be remanded. The state requests that this Court affirm the Memorandum Decision and Order of the district court.

Dated this 4th day of June, 2012.

/s/
L. LaMont Anderson
Deputy Attorney General
Chief, Capital Litigation Unit

STATEMENT OF RELATED CASES

To the best of the state's knowledge, there is one related cases pending before this Court, Leavitt v. Arave, #12-35427.

Dated this 4th day of June, 2012.

/s/
L. LaMont Anderson
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF COMPLIANCE

I certify that:

3. Briefs in Capital Cases

__X__ This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4

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Dated this 4th day of June, 2012.

/s/
L. LaMont Anderson
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on or about the 4th day of June, 2012, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

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