NO. 12-35450

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

REPLY BRIEF OF THE APPELLANT

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

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

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

Attorneys for Appellant

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STATEMENT OF ISSUES

Respondent-Appellee correctly points out that Petitioner-Appellant neglected to provide a Statement of Issues in his Opening brief. *See* Respondent-Appellee's Answering Brief, filed June 4, 2012 (Dkt. 11) (hereafter Answering Brief), p. 2. Considering the pressures of looming deadlines, and this Court's direction for abbreviated briefing, we respectfully request that the Court excuse counsel's inadvertent neglect and consider the issue presented as follows:

Did the district court err when it denied Mr. Leavitt the opportunity in this capital case to develop his claim that his conviction was tainted by the ineffective assistance of his trial counsel?

ARGUMENT

A. Introduction.

In its Respondent-Appellee's Answering Brief, filed June 4, 2012 (Answering Brief), the State responds that Mr. Leavitt has failed to establish that any of his ineffective assistance of counsel claims is "substantial." A "substantial" claim is simply one which "has some merit." *Martinez v. Ryan,* __ U.S. __ 132 S.Ct. 1309, 1318 (2012). Put another way, an "insubstantial" claim is one which "does not have any merit or ... is wholly without factual support." *Martinez,* 132 S. Ct. at 1319. Mr. Leavitt's claims most assuredly do not meet that description.

Thus, while denial of a Rule 60(b) motion is reviewed for an abuse of discretion, this Court must also examine the underlying merits of the ineffective assistance of counsel claims both at trial and in the post-conviction review under the dictates of *Martinez*. The district court applying the factors in *Phelps v. Almaida*, 569 F.3d 1120 (9th Cir. 2009), held that Mr. Leavitt had presented a proper claim to be resolved on the merits. However, it went on to address the merits of the claims finding that none warranted a grant of relief. ER 17. It is well-settled that the standard for review of ineffective assistance of counsel claims is *de novo, United States v. Birtle*, 792 F.2d 846, 847 (9th Cir. 1986). To adopt a different standard of review at this juncture would undermine the purpose of the equitable relief guaranteed by Rule 60(b). In this pre-AEDPA case, Mr. Leavitt was prevented from developing his ineffective assistance of trial counsel claims by a procedural default ruling of the district court in 1996; equity demands that he be returned to his status before the 1996 ruling, by remanding to the district court to permit orderly discovery and full consideration of the claims previously denied him.

B. Standards of law regarding ineffective assistance of counsel.

The proper standard for this Court to apply is whether, in light of all the circumstances, trial counsel's performance was deficient and whether the deficient

performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000).

"A lawyer who fails adequately to investigate, and to introduce into evidence, [evidence] that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999). *See also, Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999); *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994); *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690.

The court in *Strickland* stated that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. *See also Nix v. Whiteside*, 475 U.S. 157, 175 (1986). Rather he must show that there is a reasonable probability of a different outcome such that the reliability of the verdict is undermined. *Strickland*, 466 U.S. at 698. Moreover, once this prejudice has been demonstrated to the Court, it cannot be deemed harmless under *Brecht v. Abrahamson*, 507 U.S. 968 (1993). *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (citing with approval *Hill v. Lockhart*, 28 F.3d 832, 839 (8th

Cir. 1994) ("it is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim of ineffective assistance of counsel."))

In *Baylor v. Estelle*, 94 F.3d 1321, 1323 (9th Cir 1996), this Court considered trial counsel's failure to use evidence that semen found on the vaginal swabs of the victim did not match the defendant. Trial counsel was aware of the expert's report to this effect but through inaction was unable to prove this at trial. Similarly, in the present case, counsel was aware of the mixing issue before trial, but made no attempt to correct the State's expert's erroneous testimony before the jury. In assessing prejudice in *Baylor*, this Court concluded there was a reasonable probability of a different result despite the fact that the defendant had confessed to that rape and to another.

In *Driscoll v. Delo*, 71 F.3d 701 (8th Cir 1995), the Eighth Circuit found prejudice from the failure to challenge the State's serological evidence. "The district court granted Driscoll habeas corpus relief and ordered that he receive a new trial because his counsel was ineffective in allowing the jury to retire with the factually inaccurate impression that the victim's blood could have been present on Driscoll's knife." *Id.* At 707. Here, the jury and all the reviewing courts have been left with the inaccurate belief that Mr. Leavitt's blood was "deposited

contemporaneously" with that of the victim. In addition to the challenged evidence, the conviction in *Driscoll* rested upon the victim's blood on Driscoll's pants, the eyewitness testimony of other inmates and an incriminating statement from Driscoll himself. Despite this evidence, the court concluded that there was prejudice to the petitioner and granted habeas relief.

In *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992), the Sixth Circuit found prejudice from trial counsel's failure to confront the State's forensic evidence. There, the court held that the state "relied heavily" upon an expert to establish its theory that the gun was fired from a distance. Other evidence supported the testimony of the state's ballistic expert – a clump of hair was torn from the victim, which supported the theory of an altercation with the defendant before the murder; and the pistol was found cocked, which countered the argument that the victim had shot herself. Despite this other evidence, the court reversed for *Strickland* error.

C. Serology evidence.

The State argues that trial counsel (Mr. Kohler) consulted with a forensic expert (Dr. Blake) and made a strategic decision not to have the expert testify. It is of course correct that Kohler consulted Blake; and it is correct that Blake provided Kohler with the ammunition he needed to defeat the mixing argument – either by calling him as a witness or by using the analysis contained in his report

to cross-examine the State's expert. But it defies logic to suggest that Kohler's failure to use this ammunition was the product of a strategic choice.

Kohler himself never made this claim. At the PCR hearing, he testified generally that he forewent Blake's testimony to avoid corroborating the State's expert (Ms. Bradley). But this testimony was never focused directly on the mixing issue. It is true that Blake's report was consistent with Bradley's testimony on the general matter of the location and typing of blood in the room – but it was dramatically *inconsistent* on the mixing issue. Indeed, Blake's testimony could have put the mixing issue to rest in Mr. Leavitt's favor because it would have pointed out that the two blood types were not mixed, but rather underlay (or overlay) each other. Instead, Bradley's unopposed mixing testimony fueled the prosecutor's powerful closing argument, and has been echoed by every court that has considered the case since.

Given its patently obvious significance, it fell below professional norms for counsel to leave Bradley's mixing testimony unrefuted. Even if Kohler had been directly confronted with the mixing issue at the PCR, and even if he had actually claimed that his failure to present Blake's testimony on this point was based on a strategic choice, this would not end the inquiry. "[T]o be considered a constitutionally adequate strategic choice, the decision must have been made after

counsel has conducted 'reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary.' *Strickland*, 466 U.S. at 691. In addition, "'[e]ven if [a] decision could be considered one of strategy, that does not render it immune from attack--it must be a *reasonable* strategy.' *Jones v. Wood,* 114 F.3d 1002, 1010 (9th Cir. 1997) (emphasis in original)." *Correll v. Ryan*, 465 F.3d 1006, 1015 (9th Cir. 2006). Assuming Kohler would even claim a strategic purpose for his decision to leave unanswered the critical question of mixing, which has haunted this case ever since, the claim should be rejected because it could in no sense be said to be "reasonable."

What's more, PCR counsel (Parmenter) was plainly aware of this issue – he raised it during his cross-examination of Kohler at the PCR hearing, but then inexplicably allowed his questioning to trail off without ever presenting the ultimate question to Kohler. At closing argument in the same hearing he referred to the issue as "crucial," but then failed to raise it at all on appeal, resulting in its being procedurally defaulted. Because of this default, counsel have never been permitted to question Parmenter about whether this was actually a choice, and whether he thought some strategy supported it. In any event, no such strategy is imaginable.

Thus, both Mr. Leavitt's trial counsel and his PCR counsel were ineffective

– trial counsel for failing to defeat the mixing argument; and PCR counsel for failing to investigate, present, and argue trial counsel's ineffectiveness in doing so.

At page 14 of its Answering Brief, the State again points to footnote 40 in this Court's 2004 opinion in Mr. Leavitt's case, and cites *Hegler v. Borg*, 50 F. 3d 1472, 1475 (9th Cir. 1995) and its three-part test. Resolution of this aspect of Mr. Leavitt's ineffective assistance of counsel claim in a footnote on appeal, without ever giving Mr. Leavitt an opportunity to present evidence or argument on the point, however, is "clearly erroneous and its enforcement would work a manifest injustice." *Id.* Footnote 40 seems to assume that the matter is simply one of Mr. Leavitt's "disagreement with his trial counsel's decisions... ." 383 F. 3d at 840, n.40. But there has never been testimony that Mr. Leavitt and Kohler clashed on the mixing issue or that Kohler made a tactical decision not to present Dr. Blake's testimony on it. On the contrary, the ineffectiveness of trial counsel in failing to refute the mixing issue was never fully and fairly presented to the state courts.

Finally, as to prejudice (Answering Brief at pp. 16-18), it is late in the day for the State of Idaho which argued in dramatic fashion at trial that the mixing of the blood was, "as far as reason goes," the "conclusive proof of the case," ER 573, to now claim that Mr. Leavitt has failed to establish prejudice. The district court pointed to other evidence thought to support the contemporaneous laying down of

Mr. Leavitt's and the victim's blood – his visit to the hospital emergency room for treatment of a cut to his finger and his changing explanations for how the cut occurred. But these arguments are much less compelling than the mixing because they only make it *possible* that Mr. Leavitt was in the room at the time of the killing, whereas the mixing makes it definite. Surely the State is whistling past the graveyard when it characterizes the issue here as a "single snippet" from Dr. Blake's report (Answering brief at p. 17). This was a "single snippet" which would have changed the outcome of the case by undoing what the prosecutor at the time called his "conclusive proof of the case."

D. Jury instructions.

The State first argues that this issue is not properly presented by the pleadings as a claim of the ineffectiveness of trial counsel, but rather only of appellate counsel (Answering Brief at pp. 18-20). Properly understood, it presents *both*. Thus, we do not quarrel with its having been previously addressed at various points in the litigation as applying to appellate counsel. But a fair reading of paragraph 74 and Claim 11 indicate that it was also intended to apply to trial counsel. The Traverse thus did not "raise additional grounds for relief," *Cacoperdo v. Demosthenes*, 37 F. 3d 504, 507 (9th Cir. 1994), Answering Brief at pp. 19-20, but rather merely removed any doubt as to the intended scope of Claim

9 of the Amended Petition.

After conceding that Instruction 12 was not considered on the merits in *Leavitt III*, the State claims that this Court's extended discussion of the reasonable doubt and presumption of innocence instructions nevertheless amounted to addressing them on the merits. Answering Brief at pp. 20-23. Again, the fact that the panel, as Judge Winmill put it, "betrayed its skepticism" on this point, ER 35, does not convert this into a ruling on the merits. Mr. Leavitt lost this issue in *Leavitt III* on the ground that granting him a new trial would have given him the benefit of a new rule in violation of *Teague v. Lane*, 489 U.S. 288 (1989), and the Court's additional observations are therefore dicta.

Furthermore, the previous panel did not consider, even in dicta, the combined effects of instructions 13 (facts need not be proved beyond a reasonable doubt) and 12 (presumption of innocence and requirement for proof beyond a reasonable doubt do not apply to person who is guilty "in fact"). The State does not address this argument in its Answering Brief.

E. The prosecutorial misconduct and the improper knife evidence.

The State complains that these issues were previously decided on the merits in *Leavitt III* (Answering Brief at pp. 25-8), a point we conceded in our Opening

Brief (at pp. 17-20).[1] We made the point, however, that these errors should also "be considered in the determination of *Strickland* error individually and cumulatively with the other counsel errors" raised in Claim 9. Opening Brief at p. 18; *see also, id.,* p. 20.

F. Post Conviction counsel was ineffective for failing to present these issues.

The State asserts that "it is clear that Leavitt's post-conviction counsel made strategic choices regarding which claims should be raised," and in any event that "there was no prejudice as a result of any alleged deficiencies by post-conviction counsel." (Answering Brief at p. 30.) Not surprisingly, this claim is not supported by further analysis or argument. Indeed, absolutely no strategic purpose can be imagined for post conviction counsel not raising trial counsel's allowing the blood mixing argument to go unchallenged (indeed counsel *did* raise it, albeit in a glancing fashion), permitting flawed reasonable doubt instructions to be presented, standing silent in the face of prosecutorial misconduct, or for not objecting to Ms. Rich's testimony regarding the display of a knife during a sexual encounter. Furthermore, the prejudice flowing from this failure is obvious – it led to the

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[1] We did, however, neglect to include the transcript of the "nature and calling of defense attorneys" argument among our Excerpts of Record. Accordingly, a Supplemental Excerpt of Record (SER) is filed contemporaneously with the present Reply Brief, *see* SER, p. 1.

claims being defaulted under existing law when first considered in the district court, and to their hurried presentation now under the gun of an impending execution.

CONCLUSION

For all these reasons the Court should stay Mr. Leavitt's execution and remand the case to the district court for an orderly consideration of the ineffectiveness of his trial counsel.

DATED this 5th day of June, 2012.

/s/
David Z. Nevin
Andrew Parnes

CERTIFICATION PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Ninth Circuit Rule 32-1 and Fed. R. App. P. 32(a)(7)(c), I certify that the attached reply brief is proportionately spaced, has a typeface of 14 points or more and contains 2789 words.

Dated: June 5, 2012.

/s/
David Z. Nevin

STATEMENT OF RELATED CASE PURSUANT TO CIRCUIT RULE 28-2.6

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

Dated: June 5, 2012.

/s/
David Z. Nevin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 5th day of June, 2012, I caused a true and correct copy of the foregoing reply brief to be served on LaMont Anderson, Deputy Attorney General, State of Idaho, by electronic court filing.

/s/
David Z. Nevin