

NO. 11-10772

IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD A. LEAVITT,

Petitioner,

v.

ARVON J. ARAVE, Warden,

Respondent.

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On Petition For Writ of Certiorari  
To The United States Court Of Appeals For The Ninth Circuit

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BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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LAWRENCE G. WASDEN  
Attorney General of Idaho

L. LaMONT ANDERSON \*  
Deputy Attorney General  
Chief, Capital Litigation Unit  
Criminal Law Division  
700 W. State Street  
Boise, Idaho 83720-0010  
Telephone: (208) 334-4539

*Attorneys for Respondent*

*\* Counsel of Record*

**CAPITAL CASE**

**QUESTIONS PRESENTED**

Petitioner Richard A. Leavitt (“Leavitt”) raises the following questions before this

Court:

I.

WHETHER IN CONSIDERATION OF A MOTION FILED PURSUANT TO *MARTINEZ V. RYAN*, THE DISTRICT COURT ERRED IN NOT PERMITTING PETITIONER TO DEVELOP THE RECORD OF INEFFECTIVE ASSISTANCE OF COUNSEL ON A CLAIM WHICH HAD BEEN PROCEDURALLY DEFAULTED IN 1996.

II.

WHEN A STATE HIGH COURT AFFIRMS A DEFENDANT’S CONVICTION BUT REVERSES HIS SENTENCE, THE DATE OF “FINALITY” OF THE STATE-COURT JUDGMENT FOR PURPOSES OF APPLYING THE NONRETROACTIVITY RULE OF *TEAGUE V. LANE* TO A CLAIM CONCERNING THE GUILT PHASE OF TRIAL IS THE DATE ON WHICH THIS COURT DENIES CERTIORARI FROM THE SUBSEQUENT STATE COURT OPINION AFFIRMING THE NEW SENTENCE.

III.

UNDER *AKE V. OKLAHOMA* A COURT IS REQUIRED TO APPOINT AN ADDITIONAL EXPERT IF NECESSARY TO COMPLETE AN APPROPRIATE MENTAL EXAMINATION.

(Petition, p.i) (verbatim).

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## STATEMENT OF THE CASE

If the last two questions presented by Leavitt sound familiar to this Court, it is because they were raised in his last Petition for Certiorari, which was denied on May 14, 2012. Leavitt v. Arave, --- U.S. ---, 2012 WL 509134 (2012). Respondent's ("state") response to the last two questions will likewise be familiar to this Court.

In 1985, Leavitt was found guilty of the first-degree murder of Danette Elg and given the death penalty. The Idaho Supreme Court detailed the facts surrounding Danette's murder as follows:

Sometime about July 18, 1984, the victim was brutally attacked in her bed. She suffered up to fifteen separate slash and stab wounds, some of which proved fatal. Her body had been further brutalized by the slashing removal of her sexual organs. The body of the victim was not discovered until three or four days following the killing. It is clear that the killing took place on the victim's waterbed which was punctured and torn by the attacker's knife. The combination of the body decomposition, together with the mixture of body fluids and the waterbed liquid, made impossible any determination of rape as a motive for the killing.

The defendant and the victim were both residents of the city of Blackfoot and knew each other. The victim had reported a prowling incident on the night of July 16, 1984, in which she advised the police that the prowler, thought to be the defendant, had tried to enter her home. During the incident the intruder had cut a window screen on the victim's home.

During the interim between the murder and its discovery, the defendant had contacted friends of the victim and also the police, expressing curiosity as to the victim's whereabouts. He claimed that co-workers and the employer of the victim had called him after she failed to appear at work. No such callers were ever located. After the murder and before the body was discovered, the Blackfoot police received two telephone calls stating facts thought to be capable of being only known to the murderer. The caller gave the name "Mike Jenkins" but no person by the name has ever been located. The prosecution asserts that logically the defendant was the only person who could have made the calls because of his detailed knowledge. On July 21 the defendant obtained permission from the victim's parents to enter the home which had been locked and

apparently unattended. With the help of the Blackfoot police, entry was made into the house and the body was discovered.

The evidence pointing to the defendant as the murderer was largely circumstantial in nature. The defendant sustained a serious incise wound to his left index finger, and on the night of July 18, 1984, he was treated for that wound at the emergency room of the Bingham Memorial Hospital. Blood samples were gathered from the scene of the crime, and serology tests showed that two distinct blood types were present. The victim's blood was type A, and tests of the blood samples from the crime scene reveal that type O blood had been deposited contemporaneously with that of the victim's type A blood. The blood of sixteen suspects was tested and it was the serologist's opinion that the defendant was the only likely source of the type O blood. The defendant initially denied that his blood could be in the victim's bedroom, but later changed his story to admit he had been in the victim's bedroom and suffered a nosebleed, but contended the incident had happened one week prior to the murder. No explanation could be offered as to how his blood became mixed with that of the victim. The defendant asserted that he had cut his finger while in his own home attempting to upright a toppled fan. Laboratory tests of the Leavitt fan concluded that it lacked any blood residue or any indication that it had been recently cleaned, and furthermore, tests conducted with the fan were unable to duplicate the type of wound on Leavitt's finger. That "fan explanation" was abandoned by the defendant for the first time at trial wherein he admitted that he and his wife had perjured themselves and stated that the injury in fact had been sustained while he was attempting to prevent his wife from attempting suicide.

While confined in jail, the defendant wrote a letter to his wife containing specific instructions involving her future testimony. That letter was discovered and confiscated during a routine inspection of the jail. At trial the court ruled that the letter had been properly seized and it was used for impeachment purposes during the testimony of the defendant's wife, and further used to impeach defendant's testimony as inconsistent statements.

At trial two witnesses testified to events offered to show the defendant's alleged morbid sexual curiosity, and his frequent possession and use of knives. The defendant's former wife testified that Leavitt had been observed excising and then playing with the female sexual organs of a deer. It was noted that the killer of the victim here had similarly mutilated the body by removing sexual organs from it during the fatal attack. The former mistress of the defendant testified that the defendant displayed a hunting knife prior to their engaging in sexual intercourse,

which testimony suggested that the defendant used knives to increase his satisfaction during sexual intercourse.

State v. Leavitt (Leavitt I), 775 P.2d 599, 601-02 (Idaho 1989).

At trial and sentencing, Leavitt was represented by Jay Kohler and Ron Hart. Leavitt v. Arave (Leavitt IV), 646 F.3d 605, 606 (9<sup>th</sup> Cir. 2011). During trial preparation, Leavitt's attorneys attempted to confront the blood evidence by consulting with a serologist, 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." (Resp. App. pp.177-78) During post-conviction proceedings, Kohler further discussed Dr. Blake's involvement and explained they made a tactical decision not to call Dr. Blake because his testimony would have been consistent with Bradley's testimony. (Id., pp.178-79, 188-93.)

After being found guilty, the Honorable H. Reynold George found the state had proven three statutory aggravating factors, concluded the mental health evidence presented at Leavitt's sentencing "is not a mitigating factor, but rather a condemning factor" because "[i]t is the catalyst to provoke another possible homicide or serious physical injury," and sentenced him to death. (Resp. App., p.133.) After sentencing, David Parmenter replaced Kohler and Hart, representing Leavitt during post-conviction proceedings and the consolidated appeal under I.C. § 19-2719(6). Leavitt IV at 607.

The Idaho Supreme Court affirmed Leavitt's conviction and the denial of post-conviction relief, but reversed his death sentence because Judge George failed to "detail any adequate consideration of the 'mitigating factors' considered, and whether or not the 'mitigating circumstances' outweigh the gravity of any 'aggravating circumstance' so as

to make unjust the imposition of the death penalty.” Leavitt I, 775 P.2d at 607. Certiorari was denied on October 16, 1989. Idaho v. Leavitt, 493 U.S. 923 (1989).

After reviewing the extensive mitigation investigation completed by Kohler and Hart before the first sentencing, including mental health evidence that was considered a “condemning factor” by Judge George, Parmenter “made a strategic decision to focus on convincing the judge that Leavitt was a ‘good guy’ rather than pursue the mental health angle that had proven unsuccessful at the first sentencing.” Leavitt IV, 646 F.3d at 607.<sup>1</sup> Focusing upon the brutal nature of the murder, particularly the “anal cutting and removal of certain sexual organs from the nude body of the victim,” Judge George found the state had proven one statutory aggravating factor, that the mitigation did not outweigh the statutory aggravating factor, and sentenced Leavitt to death. (Resp. App., pp.136-54.) The Idaho Supreme Court affirmed Leavitt’s death sentence, State v. Leavitt (Leavitt II), 822 P.2d 523 (Idaho 1991), and his petition for certiorari was denied on November 9, 1992, Leavitt v. Idaho, 506 U.S. 972 (1992).

Leavitt’s amended federal habeas petition included a challenge to jury Instruction 12, which discusses the “presumption of innocence” (claim 11), and several ineffective assistance of counsel claims (claim 9). (Resp. App., pp.226-30, 234-38.) Because they were procedurally defaulted, the district court dismissed most of the ineffective assistance of counsel claims, Leavitt v. Arave (Leavitt III), 383 F.3d 809, 839 (9<sup>th</sup> Cir. 2004), and initially denied relief on the merits of the remaining claims (Pet’s App. pp.200-323), but on reconsideration conditionally granted the writ on the jury instruction claim (id.,

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<sup>1</sup> Leavitt was resentenced by Judge George because Ring v. Arizona, 536 U.S. 584 (2002), which requires juries to find statutory aggravating factors in capital cases, had not been decided.

pp.174-98) and entered an Amended Judgment on December 14, 2000 (Resp. App., p.250) that was stayed April 13, 2001 (id., pp.251-58).

Concluding Leavitt's conviction became final in 1989 after this Court denied certiorari and that he was seeking the benefit of a new rule from Cage v. Louisiana, 498 U.S. 39, 41 (1990), the Ninth Circuit reversed the district court's decision regarding the jury instruction claim because it violated the new rule prohibition under Teague v. Lane, 489 U.S. 288 (1989). Leavitt III, 383 F.3d at 816-26. Based upon Hoffman v. Arave, 236 F.3d 523, 530 (9<sup>th</sup> Cir. 2001), the Ninth Circuit also reversed the district court's denial of Leavitt's claim of ineffective assistance of counsel at resentencing and remanded for consideration of the merits. Leavitt III, 383 F.3d at 839-40. The Ninth Circuit affirmed denial of the remaining claims. *See generally*, Leavitt III. This Court denied Leavitt's petition for certiorari. Leavitt v. Arave, 545 U.S. 1105 (2005).

On remand, after an evidentiary hearing, the district court concluded Leavitt had met his burden of establishing ineffective assistance of counsel at the resentencing and conditionally granted habeas relief. (Pet. App., pp.87-135.)

The Ninth Circuit again reversed, reasoning Leavitt failed to meet his burden of establishing either deficient performance or prejudice as required under Strickland v. Washington, 466 U.S. 668 (1984). Leavitt IV, 646 F.3d at 608-16. The Honorable Stephen Reinhardt dissented. Id. at 617-26. This Court denied certiorari on May 14, 2012. Leavitt v. Arave, --- U.S. ---, 2012 WL 509134 (2012).

While Leavitt's Petition for Certiorari was pending, on March 20, 2012, this Court decided Martinez v. Ryan, --- U.S. ---, 131 S.Ct. 2960 (2011). As a result of Martinez, Leavitt filed a Motion for Relief from Judgment Pursuant to Fed. R. Civ. P.

60(b) (“Rule 60(b) Motion”) (Resp. App., pp.259-72), contending the district court’s dismissal of Claim 9 because of procedural default was incorrectly decided (Resp. App., pp.250-72). Leavitt subsequently narrowed his argument to four ineffective assistance of trial counsel claims, including: (1) allegedly failing to challenge the serology evidence; (2) failing to object to portions of the prosecutor’s closing argument; (3) failing to object to testimony regarding a consensual sexual encounter involving a knife; and (4) failing to object to various jury instructions, particularly instruction 12. (Resp. App., pp.292-302.) On May 17, 2012, after this Court denied Leavitt’s Petition for Certiorari, the Ninth Circuit’s Mandate issued, and pursuant to I.C. § 19-2715(3) (Resp. App., pp.313-14), a Death Warrant was issued for Leavitt’s execution on June 12, 2012 (Resp. App., pp.273-76) while the Rule 60(b) Motion was pending.

On May 17, 2012, without notice to the state, the district court approved Leavitt’s request for funding “to conduct testing of certain blood samples from the crime scene.” (Resp. App., p.280.) Leavitt’s attorneys “immediately began efforts to reach the Bingham County Prosecutor, Mr. J. Scott Andrew, to request that he forward the evidence to a lab [they] had contacted in Salt Lake City, UT, and which was willing and able to conduct the testing on an expedited basis.” (Id., p.281.) Counsel had difficulty contacting Andrew, but on May 21, 2012, Andrew sent counsel a letter declining to release the evidence, which is in the custody of the Blackfoot Police Department, because Andrew does “not believe [he has] the authority to order them to send it anywhere, and even assuming [he] did, [is] unwilling to issue such a directive.” (Id., p.288.) Andrew expressly noted I.C. § 19-4902, Leavitt’s failure to seek DNA testing within the time

frame required by the statute, and his belief that Leavitt's current request "makes it clear that it is merely a tactic to delay Mr. Leavitt's execution." (Id.)

On May 21, 2012, Leavitt filed a Motion for Order to Submit Evidence for Testing ("Motion to Submit") asking the district court for an Order directing the Blackfoot Police Department to forward to Sorenson Forensics the following items "for forensic testing": (1) shirt; (2) sex crime kit; (3) tan corduroy shorts; (4) pale lavender panties; (5) locking mechanism; and (6) "R. Leavitt blood reference." (Resp. App., pp.277-79.) The court denied Leavitt's motion, concluding it was without jurisdiction, and even if it had jurisdiction, Leavitt had failed to establish "good cause" for discovery under Rule 6 of the Rules Governing Section 2254 Cases. (Pet's App., pp.61-65.) The court also denied Leavitt's request for reconsideration. (Id., pp.57-60.)

Addressing Leavitt's Rule 60(b) Motion, the district court initially concluded Leavitt failed to establish cause to overcome procedural default because he failed to establish post-conviction counsel was ineffective as required under Martinez. (Resp. App., pp.39-42.) The court also addressed each of the four ineffective assistance of trial counsel claims. Regarding trial counsels' alleged failure to challenge the forensic serology evidence, the court recognized this claim was decided on the merits by the Ninth Circuit in Leavitt III, 383 F.3d at 840 n.40, 46, and, therefore, concluded it resulted in a second or successive application for habeas relief without authorization from the Ninth Circuit. (Resp. App., pp.30-32.) Alternatively, the court concluded, "this is not a claim with substantial potential merit" because trial counsel made a tactical decision not to present the testimony of Dr. Blake and failed to establish prejudice under Strickland. (Resp. App., pp.46-49.) The court concluded the claim regarding the prosecutor's

closing argument was also rejected by the Ninth Circuit, and even if it wasn't rejected, "the objections would have either been overruled as lacking in merit or, if sustained, there is no reasonable probability that the result of the trial would have been different." (Id., pp.49-50.) The same is true with the claim regarding a consensual sexual encounter involving a knife – the Ninth Circuit previously rejected the claim under due process, it was tactical not to object, and there was no prejudice. (Id., pp.50-51.) Finally, the court rejected the instruction claim because, not only was Leavitt expanding the claim beyond what was raised in his amended petition resulting in a second application for habeas relief (id., pp.31-32, 51-53), but the same claim was denied under due process in Rhoades v. Henry, 638 F.3d 1027, 1045 (9<sup>th</sup> Cir. 2011), and counsels' performance in Leavitt's case was, therefore, neither deficient nor prejudicial (Resp. App., pp.53-55). The Ninth Circuit unanimously affirmed the denial of the Motion to Submit and Rule 60(b) Motion. (Resp. App., pp.4-9.) Judge Reinhardt wrote a concurrence. (Pet's App., pp.11-17.)

## **REASONS FOR DENYING THE WRIT**

### I.

#### Leavitt Has Failed To Establish A Split Among The Circuits Or That The Denial Of His Rule 60(b) Motion Raises An Important Constitutional Question That Should Be Addressed By This Court

##### A. Introduction

Leavitt's primary complaint stems from the contention that he "has never been given a fair opportunity to develop the record" because his ineffective assistance of trial counsel claims were procedurally defaulted, and this Court should grant certiorari "to establish the procedures to be employed in federal courts for consideration of claims which had been previously defaulted under then existing law." (Petition, pp.8-9.)



Leavitt's argument focuses upon his alleged inability to develop the claim regarding trial counsels' alleged failure to challenge the serology evidence.

Leavitt's arguments fail because his claims were reconsidered under his Rule 60(b) Motion which provides limited review, some of his claims involved successive applications for habeas relief, he failed to establish a substantial claim of ineffective assistance of trial counsel, and he failed to establish ineffective assistance of post-conviction counsel. Therefore, this is not a proper case to establish procedures that should allegedly be applied to Martinez claims.

B. Rule 60(b) Motions Are Reviewed For Abuse Of Discretion

As this Court has explained, Courts of Appeals may review a Rule 60(b) motion "only for abuse of discretion, however, and an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." Browder v. Director, Dept. of Corr. Of Ill., 434 U.S. 257, 263 n.7 (1978). Therefore, Leavitt's contention that he should "be placed back to the stage in the proceeding where they had been defaulted" (Petition, p.9) is contrary to this Court's precedent and is not supported by any other authority. Irrespective, even if the claims were reviewed as they were pled prior to being defaulted, the lower courts correctly concluded they fail, particularly the claim regarding the state's serology evidence.

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

In Martinez, 131 S.Ct. at 1320, this Court concluded, "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from

hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” “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.” *Id.* 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 v. Ryan*, 2012 WL 1676696, \*6 (9<sup>th</sup> Cir. 2012) (quoting *Martinez*, at 1318). As explained in *Sexton v. Cozner*, 2012 WL 1760304, \*7 (9<sup>th</sup> 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 as to his substantive ineffective assistance of trial counsel claims because he has not established deficient performance or prejudice.

1. Standards Of Law Regarding Ineffective Assistance Of Counsel

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; 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.

“[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. Cronin, 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.”

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. The Claim Regarding The Serology Evidence Involved A Successive Application For Relief, Was Not Substantial, And Did Not Warrant Further Evidentiary Development

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.” (Resp. App., p.230.) Not only does Leavitt fail to explain how trial counsel failed to counter the blood evidence, but he has refused to acknowledge that trial counsel consulted with a Dr. Blake and that trial counsel made a strategic decision not to have Dr. Blake testify because most of his conclusions were in harmony with the state expert’s conclusions.

During her testimony, Bradley discussed testing completed on some lavender panties and brown corduroy shorts. While the panties had “A type sweat in the blanks,” the shorts did not, “rather than it being a factor from the sweat, it **could** even have been a mixture of blood types themselves.” (Resp. App., p.33) (emphasis added). During the

post-conviction evidentiary hearing, Kohler explained Dr. Ed Blake “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.” (Id., pp.177-78.) Kohler further 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.178.) 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.179.) 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.189.) And while Kohler could not “specifically recall” the following sentence from Dr. Blake’s report - “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.190-91) (emphasis added).

This was a tactical decision by trial counsel. 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” (Resp. App., p.179), 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.56-65). Even the prosecutor explained he "would have been delighted had the Defense called Dr. Blake as a witness. We looked forward to Dr. Blake arriving at this trial so we could be allowed cross examination to put the frosting on the cake." (*Id.*, p.201.) Undoubtedly, had trial counsel called Dr. Blake to testify, which would have corroborated most of Bradley's testimony regarding the blood evidence, Leavitt would be contending trial counsel was ineffective for having Dr. Blake testify, "emphasiz[ing] the strongest part of the State's case," (*id.*, p.179), and providing "the frosting on the cake" (*id.*, p.201). 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. More importantly, it establishes further evidentiary development is not required and this is not the case to establish some new "scope of procedures" associated with Martinez claims.

As a result of Kohler's testimony, it was little wonder that in Leavitt III, the Ninth Circuit 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 (9<sup>th</sup> Cir. 2001)). Therefore, Leavitt's Rule 60(b) argument failed not only because he did not establish deficient performance, but his claim was previously addressed on the merits by the Ninth Circuit, which resulted in a successive application for relief. See Gonzalez v. Crosby, 545 U.S. 524, 529-30 (2005) (When a Rule 60(b) motion seeks to "add a new ground for relief" or "attacks the federal court's previous

resolution of a claim *on the merits*,” it constitutes an application for habeas relief and is governed by § 2244(b)) (emphasis in original).

Moreover, Leavitt failed to establish prejudice. Bradley merely testified there “could” have been a mixing of blood types, and Dr. Blake’s report merely explained “a weak A Antigen **may** result from thin smears of A Blood overlying the type O blood.” (Resp. App., pp.190-91.) Not only has Leavitt failed to establish why a defense attorney would call an expert to corroborate the state’s most important evidence when he could only state there “may” be an overlay of blood while the state’s expert only stated there “could” be a mixture, he has completely failed to explain the difference between an overlay of blood versus mixing of blood. And his argument is not supported by the contention that his claim was procedurally defaulted because an affidavit from an expert could have explained the difference prior to procedural default proceedings. Moreover, Leavitt could have asked for DNA testing in 2001 when Idaho passed I.C. § 19-4902, which allowed for DNA testing even in cases such as Leavitt’s. In fact, Leavitt filed a successive post-conviction petition challenging his sentence under Ring v. Arizona, 536 U.S. 584 (2002). State v. Leavitt, 120 P.3d 283 (Idaho 2005). Certainly, he could have also filed a DNA post-conviction petition under I.C. § 19-4902.

Based upon the tactical decision made during trial and his failure to establish any prejudice, Leavitt has failed to explain how the lower court’s erred or why this Court should grant certiorari to explain the alleged scope of procedures in a Martinez case. Simply stated, Leavitt’s claim fails because he has never demonstrated a colorable claim of ineffective assistance of trial counsel that warranted further development or discovery.



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

Addressing ineffective assistance of post-conviction counsel, this 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. 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 (Pet. App., 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)). This 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, Leavitt’s post-conviction counsel made strategic choices regarding which claims should be raised and, based upon Kohler’s testimony, apparently chose not to further challenge trial counsels’ handling of the serology evidence. 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 by the district court and Ninth Circuit, 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.

## II.

### Leavitt Has Failed To Establish A Split Among The Circuits Or That Instruction 12 Raises An Important Constitutional Question That Should Be Addressed By This Court

#### A. Introduction

Leavitt’s primary contention regarding Instruction 12 stems from his request that this Court determine “at what point does finality attach for the purpose of applying, on collateral review, the retroactive bar announced in *Teague v. Lane*, in a case where a defendant’s conviction is affirmed on direct review, but is remanded for resentencing?”

(Petition, p.14.) This is one of the questions Leavitt raised in his last Petition for Certiorari, which this Court denied. Leavitt, 2012 WL 509134.

Leavitt has failed to provide any further argument that would warrant the granting of certiorari when it was just rejected less than one month ago. While this Court has not addressed the scenario of Leavitt's case, relying upon Supreme Court precedent, the circuits have concluded finality for purposes of Teague on guilt-phase claims is not dependent upon resentencing being completed. However, irrespective of whether Leavitt's conviction was "final" for Teague purposes in 1989 or 1992, because this Court had not issued an opinion regarding an instruction similar to Instruction 12 and there was a split in the circuits and states as to whether such an instruction constituted constitutional error, no state would have felt compelled by existing precedent to conclude the instruction was unconstitutional even in 1992. Finally, because Instruction 12 is not unconstitutional, Leavitt has failed to raise an important constitutional question that should be addressed by this Court at this time.

B. The Jury Instruction Challenged By Leavitt

Because single instructions may not be viewed in isolation, Cupp v. Naughten, 414 U.S. 141, 147 (1973), it is important to detail some of the instructions given by the trial court. Instruction 12, which forms the basis of Leavitt's challenge, reads as follows:

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

(Resp. App., p.85.)

Instruction 10 reads as follows:

Before you can convict a defendant of the crime charged against him by the Information, you should require the prosecution to prove every material allegation contained in the Information beyond a reasonable doubt; and if, after a consideration of all the evidence in the case, you entertain a reasonable doubt of the truth of any one of these material allegations, then it is your duty to give the defendant the benefit of such doubt and acquit him. Probabilities, or that the greater weight or preponderance of the evidence supporting the allegations of the Information, will not support a conviction.

(Resp. App., p.83.) When read to the jury, the trial court added an additional sentence,

“There must be proof beyond a reasonable doubt.” (Resp. App., p.129.)<sup>2</sup>

Instruction 11 reads as follows:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(Resp. App., p.84.)<sup>3</sup>

Instruction 13 reads as follows:

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<sup>2</sup> As explained by the Ninth Circuit, 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.”).

<sup>3</sup> As recognized by the Ninth Circuit, Leavitt III, 383 F.3d at 822, in Victor v. Nebraska, 511 U.S. 1, 16 (1994), this 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.”

It is not necessary that all the facts and circumstances surrounding the testimony and evidence that is given on behalf of the State shall be established beyond a reasonable doubt. All that is necessary is that all the facts and circumstances in evidence, together, shall establish the defendant's guilt beyond a reasonable doubt.

(Resp. App., p.86.)<sup>4</sup>

Instruction 36 reads as follows:

A doubt produced by undue sensibility in the mind of the juror in view of the consequences of a guilty verdict, is not a reasonable doubt, and the jury are not allowed to create sources or materials of doubt by trivial and fanciful suppositions or by remote conjectures as to possible state of facts different from those established by the evidence. Your oath imposes upon you no obligation to doubt when no doubt would exist if no oath had been administered, and, in consideration of the case, the jury is not to go beyond the evidence to hunt up doubts. A doubt to justify an acquittal must be reasonable.

(Resp. App., p.110.)<sup>5</sup>

Instruction 39, which was specifically requested by Leavitt, reads as follows:

You are further instructed that an alibi is an affirmative defense and it is incumbent upon the defendant where he relies upon the defense of an alibi to prove it, not beyond a reasonable doubt, nor a preponderance of the evidence, but by such evidence and to such a degree of certainty as will, when the whole evidence is considered, create and leave in the minds of the jury a reasonable doubt of his guilt.

(Resp. App., p.113.)<sup>6</sup>

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<sup>4</sup> “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.” Leavitt III, 383 F.3d at 822 (emphasis in original) (citing Harris v. United States, 536 U.S. 545, 549 (2002)).

<sup>5</sup> “[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 also to possible . . . facts different from those established by the evidence.’” Leavitt III, at 822 (emphasis in original) (citing Victor, 511 U.S. at 5).

The Ninth Circuit also examined a number of other instructions in determining “[e]xisting precedent did not ‘dictate’ or ‘compel’ the conclusion that there was a reasonable likelihood that the jury interpreted the instructions to allow for a conviction by proof less than proof beyond a reasonable doubt,” Leavitt III, 383 F.3d at 818, noting “[t]here are nine different instructions that state the burden of proof correctly” and “three instructions made clear that the decision to convict must be based only on evidence at trial,” id. at 818 n.3 (quoting the twelve additional instructions).

C. The Legal Parameters Of *Teague*<sup>7</sup>

In Teague, this Court adopted a new standard regarding the retroactive application of new constitutional rules for cases on collateral review. The Court explained a “habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.” Id. 489 U.S. at 306. As explained in Lambrix v. Singletary, 520 U.S. 518, 527 (1997) (internal quotations, citations, and brackets omitted), a three-step process is required to complete Teague analysis:

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<sup>6</sup> The Ninth Circuit 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 preponderance of the evidence” and, “for all practical purposes, there was no alibi.” Leavitt III, 383 F.3d at 823 (emphasis omitted).

<sup>7</sup> The record does not support Leavitt’s contention that the state raised Teague for the first time on appeal. (Petition, p.13.) In its answer to Leavitt’s amended petition, the state averred he was not entitled to relief regarding “claims respecting special reasonable doubt instructions; because to do so would require the creation of a new rule of federal constitutional law in violation of Teague v. Lane, 489 U.S. 288 (1989), and Penry v. Lynaugh, 492 U.S. 302 (1989).” See also Leavitt III at 842 (Fernandez, J., concurring) (“At the district court, the state did assert that Teague applied to Leavitt’s claims”). Irrespective, the Ninth Circuit had discretion to hear the argument, even if it had not been raised at all before the district court. Caspari v. Bohlen, 510 U.S. 383, 389 (1994).

First, [the court] determines the date upon which the defendant's conviction became final. Second, it must survey the legal landscape as it then existed and determine whether a state court considering the defendant's claims at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution. Finally, if the court determines that the habeas petitioner seeks the benefit of a new rule, the court must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity.

1. Leavitt's Conviction Became Final When The Supreme Court Denied The State's Petition For Certiorari In 1989

"Ordinarily, ascertaining the date on which a defendant's conviction becomes final poses no difficulties." Beard v. Banks, 542 U.S. 406, 411 (2004). "A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." Caspari v. Bohlen, 510 U.S. 383, 390 (1994) (citing Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987)). Relying upon this Court's precedent, the Ninth Circuit concluded Leavitt's conviction became final in 1989 when the state's Petition for Certiorari was denied and not in 1992 when this Court denied certiorari stemming from his resentencing. Leavitt III, 383 F.3d at 816-17.

Addressing when a rule is "new," in O'Dell v. Netherland, 521 U.S. 151, 156 (1997) (internal quotation and citation omitted), this Court explained, "At bottom, however, the *Teague* doctrine validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Recognizing "reasonableness" is an "objective standard," the Court concluded, "Accordingly, we will not disturb a final state conviction or sentence unless it

can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court.” *Id.* (emphasis added). Use of the phrase, “conviction or sentence became final,” establishes a conviction under Teague can become final without the sentence becoming final. Certainly, this Court would have stated, “conviction **and** sentence became final,” if, for Teague purposes, both a final conviction and sentence are mandated for purposes of determining finality for retroactivity purposes.

As explained in Gretzler v. Stewart, 112 F.3d 992, 1004 (9<sup>th</sup> Cir. 1997), “Where a judgment of conviction has been upheld by a state’s highest tribunal and the vacation of a sentence is on grounds wholly unrelated to the conduct of the trial, that conviction is final for purposes of retroactivity analysis.” *See also* United States v. Judge, 944 F.2d 523, 526 (9<sup>th</sup> Cir. 1991) (“The vacation of her sentence, on grounds wholly unrelated to the conduct of her trial, did not affect the validity of her conviction and the collateral nature of the review she now seeks.”).

The Ninth Circuit is not alone in its interpretation of finality under Teague and Griffith when there is a remand for resentencing wholly unrelated to guilt-phase claims. In Richardson v. Gramley, 998 F.2d 463, 465 (7<sup>th</sup> Cir. 1993), the court recognized the general rule that a “judgment is not final if the appellate court has remanded the case to the lower court for further proceedings.” Therefore, “in a criminal case, a judgment of conviction is not final, because the ‘relief’ sought by the prosecution is not the conviction as such but the sentence.” *Id.* However, the court explained, “there are two reasons to doubt” the conclusion that the general rule applies in retroactivity analysis. *Id.* “The first is that the decision did not purport to vacate the sentence.” *Id.* The second is because the



cases discussing the general rule of finality “are interpretations of 28 U.S.C. § 1291, which defines the appellate jurisdiction of the federal courts of appeals,” while 28 U.S.C. § 1257 governs state court decisions. *Id.* at 465-66. Because the Supreme Court has interpreted “final” from the two statutes differently, the Seventh Circuit recognized, “This distinction has led the [Supreme] Court to deem a state-court judgment final if ‘the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings.’” *Id.* at 466 (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 480 (1975)); *see also* Holman v. Gilmore, 126 F.3d 876, 880-81 (7<sup>th</sup> Cir. 1997) (refusing to apply a new rule because of the difference between finality under 28 U.S.C. § 1291 and 28 U.S.C. § 1257, which governs petitions for certiorari from state courts and permits review of a federal question as “‘final’ even though the decision or judgment is not ‘final’ as the state systems understands that term”); Murtishaw v. Woodford, 255 F.3d 926, 956 n.21 (9<sup>th</sup> Cir. 2001) (recognizing the Seventh Circuit has held “a defendant’s case becomes ‘final’ for purposes of *Griffith* when he exhausts his direct appeals of his conviction, even if the direct appeals of his sentence have not yet been exhausted”).

In O’Meara v. Fencis, 617 F.3d 998, 1002-03 (8<sup>th</sup> Cir. 2010), the petitioner similarly contended the state court misapplied this Court’s precedent by concluding his conviction and sentence were not final because he was awaiting resentencing. Relying upon Schriro v. Summerlin, 242 U.S. 348 (2004), Teague, *supra*, and Griffith, *supra*, the

Eighth Circuit concluded the state court's decision was not an unreasonable application of Supreme Court precedent. O'Meara, 617 F.3d at 1004-05.<sup>8</sup>

This view is consistent with the underlying policies detailed by the plurality in Teague, particularly finality. 489 U.S. at 308. "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Id. at 309. As further explained by the Court:

The costs imposed upon the States by retroactive application of new rules of constitutional law on habeas . . . generally far outweigh the benefits of this application. In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it continually forces the States to marshal resources in order to keep in prison defendants whose trial and appeals conformed to then-existing constitutional standards.

Id. at 310 (internal brackets, quotations, and citations omitted). The Court concluded, "state courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover during a habeas proceeding, new constitutional commands." Id. (internal brackets, quotations, and citations omitted). As explained in Danforth v. Minnesota, 552 U.S. 264, 280 (2008) (emphasis omitted), "while finality is, of course, implicated in the context of state as well as federal habeas, finality of state convictions is a state interest, not a federal one."

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<sup>8</sup> The district court expressly rejected the petitioner's reliance upon Berman v. United States, 302 U.S. 211 (1937), Flanagan v. United States, 465 U.S. 259 (1984), and Burton v. Stewart, 549 U.S. 147 (2007), which discuss the general finality rule and are relied upon by Leavitt (Petition, pp.7-10), but do not address finality for purposes of retroactivity analysis. O'Meara v. Feneis, 2009 WL 515887, \*6-7 (D. Minn. 2009).

The issue of finality is just as compelling when a defendant's conviction is affirmed by the state's appellate courts, but the case is remanded for resentencing because, at least in Idaho, there will be no further opportunity to challenge guilt-phase claims in state court after the resentencing, but only claims associated with the resentencing. In State v. Creech, 966 P.2d 1 (Idaho 1998), the Idaho Supreme Court refused to address claims that were raised during the defendant's first appeal and not directly related to his resentencing, including whether the trial court erred by refusing to strike portions of the presentence report from the first sentencing, id. at 9-10, whether various statutory aggravators were unconstitutionally vague, id. at 11-12, whether Idaho's death penalty statutes violated the Eighth Amendment, id. at 15, whether jury sentencing was constitutionally mandated, id., and whether Creech should have been permitted to withdraw his guilty plea, id. at 21-22. The state is unaware of any Idaho case where guilt-phase claims have been addressed on appeal after a resentencing.

Leavitt's reliance upon Burton v. Stewart, 549 U.S. 147, 156-57 (2007) (per curiam), is misplaced because it involves finality in the context of the statute of limitation under the AEDPA, specifically 28 U.S.C. § 2241. As explained in Greene v. Fisher, --- U.S. ---, 132 S.Ct. 38, 44 (2011), "The retroactivity rules that govern federal habeas review on the merits – which include *Teague* – are quite separate from the relitigation bar imposed by AEDPA; neither abrogates or qualifies the other." Because Burton involved AEDPA's statute of limitation, there was no opportunity for the Court to address finality for purposes of Teague. Rather, the Court merely followed the general rule from Berman v. United States, 302 U.S. 211, 212 (1937), that "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." However, as detailed above, the general

rule from Berman and its progeny destroys principles of finality upon which Teague is based when a state appellate court affirms the underlying conviction, remands for resentencing, and is unable to review new rules of constitutional law associated with guilt-phase claims that are developed between the remand for resentencing and the resentencing appeal.

Leavitt's attempt to create a "split among the lower courts" by relying upon district court decisions (Petition, pp.19-20) fails because district court decisions do not provide a basis for granting certiorari. Generally, this Court looks to whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Supreme Court Rule 10(a). Presumably, because lower court decisions in both the state and federal courts are reviewed by higher courts, this Court waits for the higher court's decision before granting certiorari. Moreover, both cases upon which Leavitt relies are distinguishable. In Jordan v. Epps, 740 F.Supp.2d 802, 839-40 (S.D. Miss. 2010), and Miller v. Bell, 655 F.Supp.2d 838, 845-46 (E.D. Tenn. 2009), the courts relied upon the general rule to conclude the defendants' convictions and sentences were not final until certiorari was denied on the most recent sentencing proceeding. In Jordan, the court not only ignored the underlying policy of finality from Teague, but also ignored the cases detailed above, particularly O'Dell, 521 U.S. at 156, and the cases from the Ninth and Seventh Circuits. Moreover, the court relied upon Magwood v. Patterson, --- U.S. ---, 130 S.Ct. 2788 (2012), which also involves AEDPA and addressed the term "second or successive," which is quite different than retroactivity principles under Teague. See Greene, 132 S.Ct. at 44.

While the court in Miller rejected Gretzler v. Stewart, 112 F.3d 992, 1004 (9<sup>th</sup> Cir. 1997), it failed to address the Seventh Circuit cases and the underlying Teague policy of finality. Miller, 655 F.3d at 845-46. Moreover, the court relied upon Danforth, 552 U.S. at 291, for the proposition that “the better view” is to apply the general rule because a “question as to whether constitutional violations occurred in trials conducted before a certain date does not depend ‘on how much time was required to complete the appellate process.’” Miller, at 846. However, the question is not “how much time was required to complete the appellate process,” but what issues could be considered during the appellate process when guilt-phase claims are addressed in the first appeal and cannot be addressed, at least in Idaho, in the second appeal following a resentencing.

While Leavitt may have found two district court decisions that may be contrary to decisions from the Ninth and Seventh Circuits, he has failed to provide any authority establishing other circuits disagree with the approach taken by the Ninth and Seventh Circuits. This does not constitute a “split” that warrants this Court’s granting of certiorari. Rather, this Court should recognize the validity of the arguments espoused by the circuits that have addressed this issue and assume the two district court decisions will be appropriately addressed by the Fifth and Sixth Circuits. Further, as detailed below, because his claim is still Teague-barred even if finality was in 1992 and Instruction 12 is not unconstitutional, Leavitt has failed to raise an important constitutional question.

2. Based Upon The Legal Landscape At The Time Leavitt’s Conviction Became Final, Whether In 1989 Or 1992, The Idaho Supreme Court Did Not Feel Compelled To Adopt The Rule He Seeks

In Teague, the Court discussed the concept of what constitutes a “new rule,” explaining, “a case announces a new rule when it breaks new ground or imposes a new

obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301 (citations omitted) (emphasis in original). In determining whether the result is "dictated," the court must determine whether the result was apparent to all reasonable jurists, that is, "whether *no other* interpretation was reasonable." Lambrix, 520 U.S. at 538 (emphasis in original).

Leavitt fails to recognize that at the time his conviction was final, whether in 1989 or 1992, the United States Supreme Court had not issued an opinion regarding the constitutionality of an instruction similar to Instruction 12. The Teague inquiry "is applied to Supreme Court decisions that are, one must hope, *usually* the most reasonable interpretation of prior law." Lambrix, 520 U.S. at 538 (emphasis in original). In fact, the Court had concluded a presumption of innocence instruction need not even be given to the jury. Kentucky v. Whorton, 441 U.S. 786, 789 (1979) (per curium).

To the extent they are relevant to Teague analysis, there was also a split in the circuits and states regarding whether such an instruction was unconstitutional. In Carrillo v. State, 474 P.2d 123, 125 (Wyo. 1970), the court examined the different views of the federal and state courts regarding such an instruction and concluded:

It is apparent from the foregoing authorities that the divergent views of the courts with respect to the question before us are irreconcilable. Contrary to defendant's contention that there is an "enlightened" view or a modern trend to classify the phrase used in Instruction No. 8 as a "self-defeating qualification," we think the foregoing further demonstrates that there is no basis for such a contention. What we have are simply the plausible views of a great number of able jurists supporting both sides of the question. That, of course, makes difficult the decision we are impelled to render as a matter of first impression, such instruction not having been passed upon by this court prior to the *Kennedy* case despite the fact that it has for years been used as a standard instruction by the district courts.

In United States v. Doyle, 130 F.3d 523, 433 (2<sup>nd</sup> Cir. 1997) (citing cases), the court noted as late as 1996, well after In re Winship, 397 U.S. 358 (1970), and Cage, *supra*, the Second Circuit had upheld convictions where a similar instruction was given. The court also recognized a similar instruction was approved by the Tenth Circuit. Doyle at 536 (citing Moffitt v. United States, 154 F.2d 402 (10<sup>th</sup> Cir. 1946)). Admittedly, in 1996, in Doyle, the Second Circuit adopted the position of three circuits that disapproved of the instruction.<sup>9</sup> 130 F.3d at 536-37 (citing cases). However, not only was Doyle decided well after Leavitt's conviction became final, but forty percent of the circuits that had addressed the question at the time his conviction became final had concluded giving the instruction was not error, and no federal circuit had addressed the instruction in the context of habeas review. As detailed by the Ninth Circuit, as late as 1999, the state courts have also been split on the constitutionality of such an instruction. Leavitt III, 383 F.3d at 820-21 (citing cases).

Based upon the number of jurisdictions, including federal circuits, that had previously concluded the instruction was constitutional, Leavitt has failed to establish that in 1989 or 1992 “no other interpretation was reasonable,” Lambrix, 520 U.S. at 538, particularly in light of a complete absence of Supreme Court precedent regarding the instruction. See Leavitt III, 383 F.3d at 843 (Fernandez, J., concurring) (“I see no substantial change in the legal landscape between the two dates”).<sup>10</sup>

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<sup>9</sup> Even the Doyle court explained, “We have no occasion on this direct appeal from a federal conviction to consider the consequence of including the disapproved language in a state court jury charge, assessed on collateral review.” 130 F.3d at 540 n.14.

<sup>10</sup> The state recognizes the Ninth Circuit has subsequently rejected Judge Fernandez's conclusion. Rhoades v. Henry, 638 F.3d 1027, 1044 (9<sup>th</sup> Cir. 2011).

Obviously, the costs imposed upon Idaho by retroactively applying Cage or Winship would be great. At the time the Idaho Supreme Court reviewed Leavitt's underlying conviction in 1989, it simply had no way of knowing or even anticipating, particularly based upon the "landscape as it then existed," Graham v. Collins, 506 U.S. 461, 468 (1993), that Instruction 12 would result in a constitutional violation and require a new trial. Based upon principles of finality and the cases detailed above, Leavitt has failed to establish his case presents an important constitutional issue that warrants this Court's resources under Supreme Court Rule 10(a) or (c).

Not only has Leavitt failed to establish the Ninth Circuit's decision conflicts with a decision of another United States court of appeals, he has failed to establish this is an important constitutional question that should be settled by this Court because his claim fails if addressed on the merits. In Rhoades v. Henry, 638 F.3d 1027, 1043-45 (9<sup>th</sup> Cir. 2011), the Ninth Circuit 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 the Ninth Circuit 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). Because Leavitt's claim would fail even it were not Teague-barred, he has failed to present an issue that warrants the use of this Court's resources.

Because Leavitt has failed to meet the criteria established by Supreme Court Rule 10, particularly by raising an important constitutional question of federal law that needs to be resolved by this Court, his petition for certiorari should be denied.

### III.

#### Leavitt Has Failed To Establish A Split Among The Circuits Or That His *Ake* Claim Raises An Important Constitutional Question That Should Be Addressed By This Court

##### A. Introduction

Despite having been "examined by at least five mental health professionals, all of whom diagnosed him with personality disorders," Leavitt IV, 646 F.3d at 612, and relying primarily upon Judge Reinhardt's dissent, Leavitt contends this Court should grant certiorari because there is allegedly "a circuit split on whether *Ake* requires an appropriate examination and whether there must be additional mental health examinations when supported by the record. (Petition, pp.22-26.) This was another question Leavitt raised in his last Petition for Certiorari, which this Court denied. Leavitt v. Arave, 2012 WL 509134.

Leavitt has failed to provide further argument warranting the granting of certiorari when it was rejected less than one month ago. Not only did the record fail to support the contention that Leavitt should have been appointed another mental health expert, neither Ake v. Oklahoma, 470 U.S. 68 (1985), nor the two circuit cases cited by him support his position. Leavitt also failed to establish a split among the circuits or raise an important constitutional question that should be addressed by this Court.

B. Facts Regarding Mental Health Experts At Leavitt's Resentencing

After being convicted of Danette's murder, based upon Leavitt's request, Judge George appointed Dr. David Groberg, a forensic psychologist, to evaluate Leavitt for sentencing purposes. Leavitt IV, 646 F.3d at 607. Based upon his records review, which included an earlier report from Dr. James B. Gordon who opined Leavitt was "of average intelligence with no serious deficits in his cognitive abilities," and testing and examining of Leavitt, Dr. Groberg diagnosed Leavitt with "intermittent explosive disorder" and "antisocial personality disorder." Id. Although he recognized these disorders rarely have a physiological cause, Dr. Groberg recommended Leavitt receive a neurological examination, which Judge George granted, appointing Dr. Clark Jaynes. Id. While Dr. Jaynes' neurological examination revealed "no evidence of higher cerebral dysfunction" or any "objective neurological deficit," he believed Leavitt's CT scan showed a "very slight cortical cerebral atrophy .... [that] may or may not have an effect on his cognitive [sic] function" and suggested Leavitt be given an MRI. Id. Not only did Judge George deny Leavitt's request for another expert and the MRI, "he had an order ready and waiting before [counsel] had even presented it. The order stated that 'any further evidence of the mental condition of the defendant ... [and so the MRI] shall not be ordered.'" Id. at 611 (brackets in original). After reviewing all of the mental health evidence, Judge George concluded it was a "condemning factor. It is the catalyst to provoke another possible homicide or serious physical injury." (Resp. App., p.65.)

Prior to Leavitt's resentencing, Parmenter reviewed the mental health evidence compiled by Kohler and Hart before the first sentencing and Judge George's prior orders. Leavitt IV, 646 F.3d at 612-13. Parmenter also discussed the case with Kohler and Hart,

reviewed prior transcripts and records, and conducted interviews with Leavitt's family and prison guards. *Id.* at 608. Parmenter chose not to renew the request for the MRI or the appointment of another mental health expert, but "made a strategic decision to focus on convincing the judge that Leavitt was a 'good guy' rather than pursue the mental health angle that had proven unsuccessful at the first sentencing." *Id.* at 607.

The Ninth Circuit rejected Leavitt's contention that Parmenter was ineffective in failing to pursue further investigate mental health issues "because the decision to forego further investigation into Leavitt's mental health condition was reasonable in light of counsel's knowledge of what had transpired at, and in preparation for, the initial sentencing hearing." *Id.* at 609. The court also rejected Leavitt's contention that, "because Dr. Jaynes' findings constituted a promising lead that required follow up," Parmenter could not have made a reasonable strategic decision to forego further mental health investigation because (1) Dr. Jaynes' opinion regarding further testing was too equivocal, *id.* at 609-10, (2) Parmenter had "good reason to believe a motion for another court-appointed doctor would be denied" since "Leavitt was not constitutionally entitled to a third court-appointed psychiatric expert under *Ake*," and "[g]iven that Leavitt was not entitled to a third expert, the judge's previous hostility towards appointing another doctor became all the more relevant in Parmenter's development of a mitigation strategy," *id.* at 610-11, and (3) Judge George "had already decided the mental health evidence was an aggravating factor," *id.* at 611-12.

C. Leavitt Failed To Establish He Was Entitled To Another Mental Health Expert

Under the principle of "[m]eaningful access to justice" and an "adequate opportunity to present their claims fairly within the adversary system," this Court has

concluded criminal defendants are entitled to “basic tools of an adequate defense or appeal” and that the state must provide such tools “to those defendants who cannot afford to pay for them.” Ake, 470 U.S. at 77 (quotations and citations omitted). While recognizing the state is not required to “purchase for the indigent defendant all the assistance that his wealthier counterpart might buy,” id., the Court determined, “when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense,” id. at 83. Based upon the defendant’s “compelling interest in fair adjudication at the sentencing phase of a capital trial,” this principle applies not only at trial, but adjudication of a capital sentencing. Id. at 83-84. However, addressing the potential of the “staggering burden to the State,” the Court concluded any burden would be minimized because “the obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today.” Id. at 78-79.

Apparently recognizing he was entitled to only “one competent psychiatrist,” Leavitt attacks the Ninth Circuit’s decision that Parmenter’s performance was not deficient when he chose a different sentencing strategy because, according to Leavitt, he was entitled to “additional mental health examinations when supported by the record.” (Petition, p.24.) Not only does this not raise an important constitutional issue, it ignores the other bases for the Ninth Circuit’s conclusion that Parmenter’s performance was not deficient and that there was no error when another expert (at least the fourth) was not appointed. Specifically, the court relied upon the equivocal nature of Dr. Jaynes’

conclusion, Leavitt IV, 646 F.3d at 609-10, which even Judge Reinhardt opined merely “suggested a **possibility** of organic neurological disease,” id. at 620 (Reinhardt, J., dissenting) (emphasis added), and that Parmenter’s performance was not deficient because of Judge George’s “previous hostility towards appointing another doctor,” id. at 609, and “already [having] decided the mental health evidence was an aggravating factor,” id. at 611-12. As recognized by this Court and found at the first sentencing by Judge George (Resp. App., p.133), mitigation based upon mental health issues can be a “two-edged sword that may enhance the likelihood that the aggravating factor . . . will be found by the [judge].” Atkins v. Virginia, 536 U.S. 304, 321 (2002); *see also* Cullen v. Pinholster, --- U.S. ---, 131 S.Ct. 1388, 1396-97, 1409-10 (2011). Moreover, “[t]his Court has never established anything akin to . . . [a] ‘nothing to lose’ standard for evaluating *Strickland* claims,” Knowles v. Mirzayance, 556 U.S. 111, 122 (2009), which is what Leavitt is advocating under the facts of his case.

Further, “questions of the type presented here, namely fact-specific questions about whether a lower court properly applied the well-established legal principles that it sets forth in its opinion,” are generally not considered by this Court. Wetzel v. Lambert, -- U.S. ---, 132 S.Ct. 1195, 1200 (2012) (Breyer, J., dissenting); *see also* Kyles v. Whitley, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) (“an intensely fact-specific case in which the court below unquestionably applied the correct rule and law and did not unquestionably err” is “precisely the type of case in which we are most inclined to deny certiorari”). The Ninth Circuit “did not unquestionably err,” particularly since Leavitt was examined by at least three mental health experts, the third expert’s suggestion prior to the first sentencing that further testing take place was exceptionally equivocal, and

even when the fourth expert was appointed in 1996 and the MRI completed during habeas proceedings, “the abnormalities in the 1996 MRI were overlooked by Leavitt’s doctor, and were not discovered until 2006.” Leavitt IV, 646 F.3d at 614. There was simply no evidence at the time of Leavitt’s resentencing that the mental health opinions rendered were completed by experts who were not competent. As such, under Ake, 470 U.S. at 79, Leavitt was only entitled to “one competent psychiatrist,” which he received through the appointment of Drs. Groberg and Jaynes.

The two circuit opinions upon which Leavitt relies are neither contrary nor “create a circuit split on whether *Ake* requires an appropriate examination and whether there must be additional mental health examinations when supported by the record.” (Petition, p.20.) The facts in Wilson v. Gaetz, 608 F.3d 347 (7<sup>th</sup> Cir. 2010), are strikingly different from Leavitt’s case. A psychiatrist, Sadashiv Parwatikar, was appointed to evaluate Wilson’s fitness to stand trial and determined he was not fit. Id. at 349. Five months later Wilson was found competent by another psychiatrist. Id. Approximately two months later and one month prior to trial, Wilson’s attorney, Andrew Schnack, asked Parwatikar to testify at trial regarding whether Wilson was insane when he murdered the victim. Parwatikar explained, “a fitness evaluation and a sanity evaluation are not the same thing and reminded Schnack that he had done only the former for Wilson,” but when “pressed by Schnack, Parwatikar said he could render an opinion on Wilson’s sanity at the time of the killing but added that an effective insanity defense would require testimony by a second expert as well, someone who would perform a sanity evaluation of Wilson.” Id. Not only did Schnack fail to obtain a second expert, he “ignored Parwatikar . . . until a few hours before Parwatikar testified, when at his urgent request the lawyer

agreed to talk to him.” Id. at 350. Relying in part upon state law regarding the difference between a competency evaluation and insanity evaluation, the Seventh Circuit concluded, “Parwatarikar neither conducted an appropriate examination nor assisted meaningfully in evaluation, preparation, and presentation of Wilson’s insanity defense – the reason being the insouciance of Wilson’s lawyer, Schnack.” Id. at 351.

The differences between Wilson and Leavitt’s case are inescapable. In Wilson, state law explained the difference between competency and insanity evaluations, which made Parwatarikar’s competency evaluation virtually irrelevant since Wilson’s defense was based upon insanity; no such difference exists in Leavitt’s case. Despite the fact he had been examined by several mental health experts, there was simply insufficient evidence at the time of Leavitt’s resentencing to warrant further mental health investigation, let alone the appointment of another mental health expert, particularly since Judge George had already determined mental health evidence was aggravating, not mitigating evidence. As explained by the Ninth Circuit,

[T]here’s no indication that the examinations in this case were in any way inappropriate. The doctors reviewed Leavitt’s files, conducted a battery of psychological tests and administered both an EEG and a CT scan to detect neurological abnormalities. Due process does not require a state to fund every technologically conceivable test to rule out the possibility of an organic mental disorder. Third, even putting aside the issue of adequacy, Leavitt wasn’t entitled to additional testing because he couldn’t have “made a preliminary showing that his [mental health was] likely to be a significant factor” in his sentencing in light of the judge’s express indication to the contrary.

Leavitt IV, 646 F.3d at 611 (quoting Ake, 470 U.S. at 74).

Walker v. Attorney General for the State of Oklahoma, 167 F.3d 1339 (10<sup>th</sup> Cir. 1999), is also unavailing. Relying upon Brewer v. Reynolds, 51 F.3d 1519, 1529 (10<sup>th</sup> Cir. 1995), the Tenth Circuit recognized it had construed Ake “broadly.” Walker, 167

F.3d at 1348. Nevertheless, the court reasoned, “general allegations of need without substantive supporting facts and undeveloped assertions that assistance would be beneficial will not suffice.” Id. While the Tenth Circuit concluded a sufficient showing had been made for additional testing, id. at 1348, based upon the facts in Leavitt’s case, the Ninth Circuit simply concluded the showing was insufficient, Leavitt IV, 646 F.3d at 611, particularly in light of Judge George’s previous conclusion that mental health evidence was “the catalyst to provoke another possible homicide or serious physical injury.” (Resp. App., p.65).

Because Leavitt has failed to meet the criteria established by Supreme Court Rule 10, particularly by raising an important constitutional question of federal law that needs to be resolved by this Court, his petition for certiorari should be denied.

**CONCLUSION**

The state respectfully requests that Leavitt’s Petition for a Writ of Certiorari be denied.

DATED this 11<sup>th</sup> day of June, 2012.

Respectfully submitted,  
LAWRENCE G. WASDEN  
Attorney General of Idaho



L. LaMONT ANDERSON\*  
Deputy Attorney General  
Chief, Capital Litigation Unit  
700 W. State Street  
Boise, Idaho 83720-0010  
Telephone: (208) 334-4539  
*Attorneys for Petitioner*  
*\*Counsel of Record*

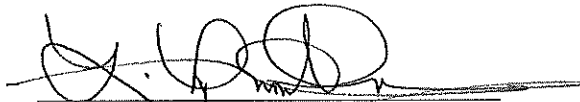


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY That on or about the 11<sup>th</sup> 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:

David Nevin	<input type="checkbox"/>	U.S. Mail
Nevin, Benjamin, McKay & Bartlett	<input type="checkbox"/>	Hand Delivery
P.O. Box 2772	<input type="checkbox"/>	Overnight Mail
Boise, ID 83701	<input type="checkbox"/>	Facsimile
	<input checked="" type="checkbox"/>	Electronic Court Filing

Andrew Parnes	<input type="checkbox"/>	U.S. Mail
Law Office of Andrew Parnes	<input type="checkbox"/>	Hand Delivery
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L. LaMONT ANDERSON  
Deputy Attorney General  
Chief, Capital Litigation Unit