No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

---

RICHARD A. LEAVITT,

Petitioner,

v.

ARVON J. ARAVE, Warden,

Respondent.

---

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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**MOTION FOR LEAVE TO PROCEED**

**IN FORMA PAUPERIS**

---

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Petitioner, Richard Leavitt, requests leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis, under Rule 39 of the United States Supreme Court Rules, and 28 U.S.C. section 1915(a).

Petitioner has been incarcerated on Idaho's Death Row since 1985. He is indigent and was granted leave to proceed in forma pauperis in the United States District Court on the petition for writ of habeas corpus which is the subject of this Certiorari Petition. Counsel were appointed pursuant to 21 U.S.C. § 848(q)(4)(B) in 1992 and have represented petitioner on an appointed basis since the original appointment. Petitioner therefore does not file a separate affidavit of indigency.

Respectfully submitted this 10th day of June, 2012.

David Z. Nevin
Counsel of Record

for Andrew Parnes

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RICHARD A. LEAVITT,

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**CAPITAL CASE**

---

**PETITION FOR WRIT OF CERTIORARI TO THE**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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CAPITAL CASE

QUESTIONS PRESENTED

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.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

The Petitioner Richard A. Leavitt, pursuant to Supreme Court Rule 12, files this Petition and respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The latest opinion of the Ninth Circuit Court of Appeals was decided on June 8, 2012. A copy of the opinion is attached hereto in the Appendix at App. 4. A Petition for Rehearing and Petition for Rehearing En Banc was denied on June 10, 2012. A copy of those orders are attached hereto in the Appendix at App. 1.

The District Court rendered its Memorandum Decision and Order on June 1, 2012. It is attached hereto in the Appendix at App. 20. It also entered Orders on May 25, 2012 (App. 57) and May 23, 2012 (App. 61).

The second opinion of the Ninth Circuit Court of Appeals is published at *Leavitt v. Arave*, 646 F.3d 605 (9th Cir. 2011). A copy of this opinion is attached hereto in the Appendix at App. 66.

The District Court Findings of Fact and Conclusions of Law rendered in September of 2007 is attached to the Appendix at App. 87. The first opinion of the Ninth Circuit Court of Appeals is published at *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004). A copy of the opinion is attached hereto in the Appendix at App. 136. The District Court decision rendered in December 2000 is attached hereto in the Appendix at App. 174. The District Court decision rendered in September 2000 is attached hereto in the Appendix at App. 200. The District Court Memorandum Decision and Order rendered in October 1996 is attached hereto in the Appendix at App. 325. The Idaho Court of Appeals decision published at *State of Idaho v. Leavitt*, 121 Idaho 4, 822 P.2d 523 (1991) is attached hereto in the Appendix at App. 346. The Idaho Court of Appeals decision published at *State of Idaho v. Leavitt*, 116 Idaho 285, 775 P.2d 599 (1989) is attached hereto in the Appendix at App. 358.

## STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. § 1254 (1). The federal district court had jurisdiction under 28 U.S.C. § 2254. This case was filed

before the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and therefore is not controlled by the provisions of that Act.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend. 5: No person shall ... be deprived of life, liberty, or property, without due process of law ... .

U.S. Const., Amend. 6: In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

U.S. Const., Amend. 14: ... nor shall any state deprive any person of life, liberty, or property, without due process of law ... .

## STATEMENT OF THE CASE

Petitioner Richard A. Leavitt was charged with the July 1984 murder of Danette Elg in Blackfoot, Idaho. A jury found Leavitt guilty at trial, and he was sentenced to death by the trial judge, sitting without a jury, on December 19, 1985. Leavitt took a direct consolidated appeal to the Idaho Supreme Court, which on May 30, 1989, affirmed the conviction and denial of post conviction relief, but vacated the death sentence and remanded for resentencing, *State v. Leavitt*, 116 Idaho 285, 775 P.2d 599 (1989).

The Supreme Court found Leavitt to be a defendant who is "atypical to any that this Court has viewed in the context of a death penalty case." *Id.*, 116 Idaho at 293, 775 P. 2d at 607. The trial judge had found that he came "'from a law abiding family, and he is presently married; has a child and was steadily employed before his arrest. He is a son, a husband, a father who has conducted himself much of the time within the norms of

society.'" *Id.* The Court directed the trial court to consider alternatives to the death penalty, especially long term incarceration. *Id.,* 116 Idaho at 294, 775 P. 2d at 608.

The State filed a petition for a writ of certiorari, which this Court denied on October 16, 1989, *Idaho v. Leavitt*, 493 U.S. 923 (1989).

Just over two months later, on December 21, 1989, a resentencing hearing was conducted, and the trial judge again sentenced Leavitt to death, announcing the sentence on February 16, 1990. Leavitt again took a direct appeal to the Idaho Supreme Court, which affirmed the new death sentence on November 27, 1991, *State v. Leavitt*, 121 Idaho 4, 822 P.2d 523 (1991). This Court denied Leavitt's petition for a writ of certiorari on November 9, 1992. *Leavitt v. Idaho*, 506 U.S. 972 (1992).

Meanwhile, on November 13, 1990, while Leavitt's resentencing appeal was pending before the Idaho Supreme Court, this Court issued its decision in *Cage v. Louisiana*, 498 U.S. 39 (1990).

On April 29, 1993, Leavitt filed his Petition for Writ of Habeas Corpus in Idaho federal court, *Leavitt v. Arave*, D. Idaho No. CV 93-0024-S-BLW. On December 14, 2000, the District Court granted the writ finding that the reasonable doubt and presumption of innocence instructions given at Leavitt's trial in 1985 were unconstitutional. The Court denied relief on Leavitt's other issues. App. 174.

The Ninth Circuit reversed, holding that in granting the writ the district court had applied a new rule of law decided after the case was final, in violation of *Teague v. Lane,* 489 U.S. 288 (1989). *Leavitt v. Arave*, 383 F.3d 809, 816-26 (2004). However, the Ninth

Circuit also reversed the District Court's refusal to consider whether Mr. Leavitt had received ineffective assistance of counsel at the resentencing, *id.,* 383 F. 3d at 839-41. This Court denied Leavitt's petition for certiorari, *Leavitt v. Arave*, 545 U.S. 1105 (2005), and the case returned to the District Court for further proceedings.

On remand, the District Court conditionally granted the writ, finding that Leavitt received constitutionally ineffective assistance of counsel at the 1989-90 resentencing, based on counsel's failure to investigate and present mitigating evidence relevant to Leavitt's organic brain injury. App. 87. The Ninth Circuit reversed over a vigorous dissent. *Leavitt v. Arave*, 646 F.3d 605 (9th Cir. 2011). Leavitt's Petition for Rehearing and Rehearing en banc was denied on September 13, 2011.

On February 10, 2012, Leavitt filed a Petition for Writ of Certiorari in this Court. On May 14, 2012, this Court denied the Petition.

On May 11, 2012, before the decision from this Court, Leavitt filed a Motion for Relief Pursuant to F.R.Civ.P. 60(b) following this Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). The motion addressed issues of ineffective assistance of trial counsel which had been procedurally defaulted in 1996 under existing case law. One of the issues raised involved the serology evidence at trial and the question of whether Leavitt's blood and that of the victim were deposited simultaneously on an item of clothing at the time of the murder. Trial counsel did not challenge this evidence.

The prosecutor at trial called this "conclusive proof" that Leavitt had committed the murder. The Idaho Supreme Court held that there could be no other explanation for

the depositing of the blood contemporaneously than that Leavitt was in Elg's house and killed her. The Ninth Circuit also relied on that evidence to conclude there was strong evidence for the jury to convict Leavitt.

To support the motion, Leavitt sought release of the evidence for further testing. The State opposed the release of the evidence, and the district court denied the testing and thereafter denied the motion. The Ninth Circuit affirmed the district court in both rulings.

While this motion was pending in federal court, the State sought and received a death warrant setting Leavitt's execution for June 12, 2012. Because of the issuance of the death warrant, the briefing on the Rule 60(b) in federal district court proceeded on an expedited basis.

The district court denied the 60(b) motion on June 1, 2012. Leavitt immediately appealed. The Ninth Circuit issued its decision affirming the district court on June 8, 2012. Leavitt's Petition for Rehearing and Rehearing en banc was denied on June 10, 2012.

Leavitt now petitions this Court for issuance of a writ of certiorari and a stay of execution pending decision by this Court.

## REASONS FOR GRANTING THE WRIT

### 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.

a. *Background and Statement of Facts*

In 1996, Leavitt's claim of ineffective assistance of trial counsel, including claims related to the jury instructions and the blood evidence, was entirely dismissed based solely on the ground of procedural default in that the claims had not been raised and fully exhausted in state court by post-conviction counsel. App. 340-41. That decision was made without an evidentiary hearing or the ability to conduct discovery on the underlying claims.

Sixteen years later, in March 2012, this Court issued its decision in *Martinez v. Ryan*, ___ U.S. ____, 132 S.Ct 1309 (2012), holding for the first time that a habeas petitioner could assert his post-conviction counsel's ineffectiveness as cause for a state procedural default of a Sixth Amendment claim of trial counsel's error. Idaho, like Arizona, requires all Sixth Amendment claims in capital cases be filed in a post-conviction petition. I.C. § 19-2719.

Leavitt filed his motion under *Martinez* in the district court on May 11, 2012, before any mandate issued from the Ninth Circuit and before the State sought a death warrant in this case. A week after the motion was filed, the State, in an ex parte

unrecorded proceeding, obtained a warrant setting the execution date for June 12, 2012. As a result, the district court then expedited all consideration of the Rule 60(b) motion, as did the Ninth Circuit. After holding that Leavitt met the standards for reconsideration set forth by this Court in *Gonzales v. Crosby*, 545 U.S. 524 (2005), the district court denied Leavitt an opportunity to develop the record. Instead, the court denied the motion based entirely on the prior pleadings and the state court record, denying Petitioner the opportunity to examine state trial and post-conviction counsel, to present testimony of potential experts, and to conduct supplemental testing of important evidence. Thus, considering that the district court defaulted this claim in 1996, Mr. Leavitt has never been given a fair opportunity to develop the record.

b. *The Scope of the Procedures to be Used in Considering Motions for Relief under* Martinez v. Ryan *Should be Set by this Court*

Sixteen years after the district court procedurally defaulted the Sixth Amendment claim, Leavitt is now first able to address the claim and to develop the record to support it. The question presented here is what procedures must be applied by district courts when resolving *Martinez* issues. The Ninth Circuit has recognized that there will be situations where the existing record is insufficient to determine the merits of the claims. *See*, *Sexton v. Cozner*, 2012 WL 1760304, at *9 (9th Cir., May 14, 2012). Given the expedited nature of the proceedings in the federal courts, created in part by the State's immediately obtaining a death warrant despite there being no deadline for doing so under state law, Mr. Leavitt has been prevented from full, deliberate consideration of the merits

of his claim.

Review should be granted to establish the procedures to be employed in federal courts for consideration of claims which had been previously defaulted under then existing law. The equitable nature of the remedy created by *Martinez* requires that petitioners be placed back to the stage in the proceedings where they had been defaulted. In his 60(b) motion, Mr. Leavitt sought consideration of previously filed claims which have never been addressed by the federal courts, not new or successive ones. Had the district court been able to consider the merits of the claims in its normal process, Leavitt would have been entitled to development of a full record on these significant constitutional rights.

Mr. Leavitt at least should have been permitted to conduct discovery on Claim 9. Rule 6(a) of the habeas rules requires a petitioner only to show "good cause" for discovery, consistent with *Harris v. Nelson*, 394 U.S. 286, 299 (1969), in which this Court stated that "where specific allegations before the court show reason to believe that the petitioner *may*, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry." (Emphasis added). At the very least, the facts of this case support a finding of "good cause" for discovery. Even if Mr. Leavitt were unable ultimately to obtain evidence sufficient to prevail at a hearing, that would not preclude a finding that he had "made a sufficient showing, as required by Habeas Corpus Rule 6(a), to establish 'good cause' for discovery." *Bracy v. Gramley*, 520 U.S. 899, 909 (1997).

*See also Jones v. Wood,* 114 F.3d 1002, 1009 (9th Cir. 1997) (discovery is available to habeas petitioners at the discretion of the district court for good cause shown, regardless of whether there is to be an evidentiary hearing); *Calderon v. United States Dist. Court for the N. Dist. of Cal.,* 98 F.3d 1102, 1104 (9th Cir. 1996) (same).[1]

Mr. Leavitt was previously defaulted – incorrectly, as it turns out after *Martinez* – and now has essentially been defaulted twice – to paraphrase this Court, "in both situations, the habeas petitioner does not receive an adjudication of his claim." *Stewart v. Martinez-Villareal,* 523 U.S. 637, 644-45 (1998). Trial counsel has never been questioned over his failure to contest the mixing testimony; nor post-conviction counsel over why he tentatively mentioned this issue in the trial court but then abandoned it on appeal. No independent expert has been permitted even to examine the evidence to determine once and for all the timing of the placement of the two blood types. The record, in short, is incomplete. By not placing Leavitt in the status quo ante in 1996, the

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[1] Except for the result, Mr. Levitt's case has an eery similarity to another discovery case, *Toney v. Gammon,* 79 F.3d 693 (8th Cir. 1996). Like Mr. Leavitt, Toney sought release of trial exhibits for DNA testing. Although the state acknowledged that the exhibits were available for testing it refused to release them, despite his claim "that such testing may well exonerate him of the crime." *Id.,* 79 F. 3d at 700. As in the present case, the district court denied the motion for testing "because such testing had no relationship to any claim before the court," and to avoid "opening the flood gates" for DNA testing. *Id.* The Eighth Circuit reversed, citing the "good cause" provisions of habeas rule 6. The Court recognized that discovery is within the discretion of the district court, but held that "denial of discovery is an abuse of discretion if discovery is 'indispensable to a fair, rounded, development of the material facts.'" *Id.,* (quoting *Townsend v. Sain,* 372 U.S. 293, 322 (1963).

district court rushed to judgment on claims which have never been fully developed in a state or federal court.

This Court should grant certiorari and remand to permit Leavitt the opportunity for full development, through discovery and possible evidentiary hearing, in the district court.

## 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.

a. *Introduction and Statement of Facts.*

Some five months elapsed between Ms. Elg's murder and Leavitt's arrest. Although suspicion focused on him as the perpetrator, Leavitt never confessed to the offense, and the evidence pointing to his guilt was largely circumstantial. At trial he presented an alibi defense. The jury was nonetheless given a series of instructions which effectively vitiated the presumption of innocence and the requirement for proof beyond a reasonable doubt. Preliminary Instruction No. 12 provided:

> 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.

(Emphasis added). Preliminary Instruction No. 10 stated that the reasonable doubt standard "should" (not must) be applied. Preliminary Instruction No. 11, which was

identical to the "Webster Instruction," defined proof beyond a reasonable doubt by reference to the suspect concepts of "moral evidence" and "moral certainty." *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850); *Victor v. Nebraska*, 511 U.S. 1 (1994).

Another instruction directed that not all the facts in the case need be proved beyond a reasonable doubt (Preliminary Instruction No. 13). Particularly in view of Preliminary Instruction No. 12, which stated that the presumption of innocence, and the requirement for proof beyond a reasonable doubt do not apply to a person who is "in fact guilty," Preliminary Instruction No. 13, could have been understood to allow conviction upon less than "proof beyond a reasonable doubt of every fact necessary to constitute" the crime charged, *In re Winship*, 397 U.S. 358, 364 (1970). The jury was also discouraged from doubting too readily (Instruction No. 36). This instruction included the mind bending directive that the oath imposed "no obligation to doubt when no doubt would exist if no oath had been administered ... ." And contrary to existing law, the instructions directed that Leavitt had the burden of raising a reasonable doubt as to the only defense he proffered -- alibi (Instruction No. 39).

Leavitt filed his only federal habeas petition on April 29, 1993. On December 14, 2000, the district granted the writ on the ground that the jury instructions described above "so undermined the concept of reasonable doubt as to violate the petitioner's rights under the Due Process Clause." App. 180. They did this by "eroding the reasonable doubt standard and by suggesting that a person who is actually guilty is not entitled to the

presumption of innocence throughout the trial," App. 187. This in turn created a "reasonable likelihood that the jury convicted the petitioner upon less than proof beyond a reasonable doubt." App. 188.

For the first time on appeal, however, the State raised a defense under *Teague v. Lane*, 489 U.S. 288 (1989). Finding that the State had not waived the issue, the Ninth Circuit turned to calculating a date for "finality" of Leavitt's case. It reasoned that since "the guilt phase and sentencing phase were bifurcated," finality should attach at the conclusion of direct review of the guilt phase, "not when his sentence became final in 1992." *Id.* at 816. The court went on to explain:

> [f]inality should be measured from the time when the decision under review—be it the conviction or the sentence—was actually made because the whole purpose of *Teague* is to 'validate[] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.'

*Id.* at 816-17 (citations omitted). The Ninth Circuit thus found that Petitioner's judgment had become final in late 1989 "when the Idaho Supreme Court rendered its guilt-phase decision and the time for petitioning for certiorari had passed." *Id.* at 816.

The Court also determined that the controlling principle of law, whether there was "a reasonable likelihood that the jury *interpreted the instructions as a whole* to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause," 383 F.3d at 817 (emphasis in original) was established by *Cage*, which was decided in November of 1990, *id.*, 383 F.3d at 816-17. Since it considered Leavitt's case

to have been final in 1989, it therefore declined to apply *Cage* to Petitioner's case on the ground that it was an unwarranted retroactive application of a new rule of constitutional law.

More than two years later, this Court decided *Burton v. Stewart*, 549 U.S. 147 (2007) (per curiam), in which it held that where a conviction is affirmed, but there is a remand for resentencing, the statute of limitations under AEDPA does not begin to run until the sentencing appeals are fully resolved. *Id.* at 156-57. The Court applied in the habeas context the general rule, long established, that a criminal case is only "final" when all direct appeals as to both conviction and sentence are completed. When the Ninth Circuit first addressed the finality issue in this case, it did not have the benefit of *Burton.*

Accordingly, the Court should now grant the Petition for Writ of Certiorari, vacate the judgment of the Ninth Circuit, and remand for further proceedings in light of *Burton.* Alternatively, the Court should grant the Petition, and rule directly that Mr. Leavitt's case was not "final" at the time *Cage v. Louisiana* was decided, and remand for further proceedings consistent with that opinion.

b. *The issue presented in this case involves an open question of law that has not yet been addressed by this court.*

The central issue presented here is: at what point does finality attach for the purpose of applying, on collateral review, the retroactivity bar announced in *Teague v. Lane*, in a case where a defendant's conviction is affirmed on direct review, but is remanded for resentencing? This question, squarely presented by Petitioner's case, has

not been directly decided by this Court.

*Teague* itself did not address this issue, although, as in the present case, the new rule petitioner sought to have applied there related not to sentencing, but to conviction. *Id.* at 295-96. In that case, however, the date of finality was clear because the conviction and sentence were both upheld on direct review at the same time. *Teague*, 489 U.S. at 293. *Teague* only mentioned finality briefly in a footnote: "[a]s we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant." *Teague*, 489 U.S. at 314 n.2 (citing *Flynt v. Ohio*, 451 U.S. 619, 620 (1965) (Harlan, J., dissenting)).

*Burton* applied this long established understanding of finality to the context of the AEDPA statute of limitations. The primary issue in *Burton* was whether the petition was a prohibited second and successive petition under AEDPA. Burton was originally convicted and sentenced in 1994, and granted a resentencing in the trial court in 1996. *Id.* at 149. On direct appeal, the state appellate court affirmed his conviction but remanded for resentencing, which took place in March of 1998. *Id.* at 150-51. Burton filed a federal habeas petition in December of 1998 while his state direct appeal of the March 1998 sentence remained pending. *Id.* at 151. The habeas petition asserted only that the 1994 judgment was invalid. Habeas relief was denied, and the denial was affirmed on appeal. In 2002, after the direct appeals from the 1998 re-sentencing were concluded, Burton filed a second federal habeas petition, arguing that the 1998 sentence was invalid. This Court concluded that this second petition was indeed a "second or successive

petition" under AEDPA because at the time of the first petition Burton was in custody pursuant to the 1998 judgment, even though that petition only articulated objections to the 1994 judgment.

Burton argued in part that he should be relieved from the prohibition on filing second or successive petitions because he was required to file the first habeas petition in 1998 in order to avoid running afoul of AEDPA's 1-year statute of limitations. Certiorari had indeed been denied on his direct appeals from the 1994 judgment in April of 1998, *see Burton v. Washington*, 523 U.S. 1082 (1998), which he argued required him to challenge that judgment by April of 1999.

This Court rejected the argument. It cited *Berman v. United States*, 302 U.S. 211, 212 (1937), for the proposition that "[f]inal judgment in a criminal case means sentence. The sentence is the judgment."

> Accordingly, Burton's limitations period did not begin until both his conviction *and* sentence "became final by the conclusion of direct review or the expiration of the time for seeking such review" – which occurred well *after* Burton filed his 1998 petition.

*Burton*, 549 U.S. at 156-7 (emphasis in original), *quoting* 28 U.S.C. § 2244(d)(1)(A). "In criminal cases, as well as civil," the *Berman* Court stated, "judgment is final for the purpose of appeal 'when it terminates the litigation between the parties on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.'" *Id.* at 212-13 (citing civil cases).

c. *The important values underlying finality in the retroactivity context mandate remanding this case to the Ninth Circuit for reconsideration in light of* Burton.

The understanding of finality announced in *Berman* and referenced in *Burton* and *Teague* is well established in this Court's jurisprudence. *See, e.g.*, *Miller v. Aderhold*, 288 U.S. 206, 210-11 (1933); *Hill v. United States ex rel. Wampler*, 298 U.S. 460, 464 (1936); *Korematsu v. United States*, 319 U.S. 432, 435 (1943); *Parr v. United States*, 351 U.S. 513, 518 (1956); *Corey v. United States*, 375 U.S. 169, 174, 176 (1963); *Flynt v. Ohio*, 451 U.S. 619, 620 (1981).

No different definition of "finality" should be manufactured for the present situation. As in these other settings, "finality" should be understood to mean the time when there is "nothing to be done but to enforce by execution what has been determined." *Berman*, 302 U.S. at 212-13 (quoting *St. Louis, Iron Mountain & S.R.R. Co. v. Southern Express Co.*, 108 U.S. 24, 28 (1883)) – in other words, when all proceedings on direct review are concluded, both as to the conviction and the sentence. It would be an unwarranted departure from this Court's precedent to define finality in other terms solely for the purposes of retroactivity.

Defining finality in the usual way in this context is in accord with the significant values underlying finality and retroactivity identified in *Teague*, which led the Court to adopt a bright-line retroactivity rule to replace the "extraordinary collection" of rulings on retroactivity that the Court issued as it dealt with the rapid evolution of constitutional criminal law. *Desist v. United States*, 394 U.S. 244, 256-57 (1969) (Harlan, J.,

dissenting). Notwithstanding the desire to cut off certain defendants from receiving the benefit of these new constitutional rules, two principles remained paramount in fashioning the bright-line retroactivity principle.

First, the Court was adamant that new constitutional rules should apply not just to the case at hand, but also to all other cases pending on direct review, lest the Court "violate[] basic norms of constitutional adjudication." *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). *See also United States v. Johnson*, 457 U.S. 537, 545-46 & n.9 (1982) (cataloguing decisions in which members of the court, including Justice Harlan, "uniformly . . . asserted that, *at a minimum*, all defendants whose cases were still pending on direct appeal at the time of the law-changing decision should be entitled to invoke the new rule") (emphasis added). Indeed, applying the new rule to cases pending on direct review did not even qualify as retroactive application. Rather, it would avoid "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule" – a tactic that Justice Harlan chastised as "an indefensible departure from [the] model of judicial review." *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring). *See also Johnson*, 457 U.S. at 546-47. Thus, in Petitioner's case, as in all cases pending on direct review, "[t]he integrity of judicial review" weighs in favor of not cutting off certain defendants from review when their sentences are still pending. *Griffith*, 479 U.S. at 323.

Second, Justice Harlan also found "[m]atters of basic principle . . . at stake" where

the inconsistent practice in pre-*Teague* retroactivity jurisprudence led to treating similarly situated defendants differently. *Desist*, 394 U.S. at 258 (Harlan, J., dissenting). "We depart from . . . basic judicial tradition," Justice Harlan wrote, "when we simply pick and choose among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law." *Id.* at 258-59. This precise problem arises in Petitioner's case, where he was similarly situated to the defendants in *Cage v. Louisiana* insofar as his case had not been finally decided when this Court announced its decision in that case. "[T]he problem with not applying new rules to cases pending on direct review" is that it results in "*actual inequity*." *Griffith*, 479 U.S. at 323 (citing *Johnson*, 457 U.S. at 556 n.16) (emphasis in original).

Accordingly, all the considerations underlying finality and this Court's prior decisions in *Teague* and *Burton* militate in favor of holding that when resentencing is pending on direct review, regardless if the conviction is affirmed, the judgment in the criminal case is not yet "final" so as to trigger the *Teague* retroactivity bar.

d. *The Court should grant the petition for writ of certiorari to resolve the conflict among the lower courts on this issue in the retroactivity context.*

The lower courts deciding this issue since *Burton* have read it and *Teague* to indicate that a judgment does not become final until after direct review of resentencing proceedings, if any. In *Miller v. Bell*, 655 F. Supp. 2d 838 (E.D. Tenn. 2009), in a situation nearly identical to the present case, the court held that petitioner's "conviction did not become final until June 28, 1990, *after* his direct appeal from his *re-sentencing*,

when the Supreme Court denied *certiorari* . . . ." *Id.* at 845. The Court relied on *Burton* and this Court's well-established rule that a "final judgment . . . means sentence." *Id.* Likewise, in *Jordan v. Epps*, 740 F. Supp. 2d 802 (S.D. Miss. 2010), the court confronted a case in which petitioner had gone through four iterations of trial and sentencing. The Court rejected the argument that his conviction became final on "the date on which the United States Supreme Court denied certiorari on [petitioner's] first appeal. *Id.* at 839. Rather, the court stated that "in light of the language of *Teague* and the recent holding in *Magwood*, this Court is convinced that the correct holding is that [petitioner's] most recent conviction *and* sentence were not final until . . . the date on which certiorari was denied on *the most recent* sentencing proceedings," which had been affirmed on direct review just prior to the filing of his habeas petition. *Id.* at 839-40 (second emphasis added). *Jordan* was clear that, after *Burton*, "[i]n the context of retroactivity, both the conviction *and the sentence* must become final before a defendant is precluded from relying on a change in the law." *Id.* at 839 (emphasis added). *See also, Lesko v. Wetzel*, 2012 WL 111122b (D. W.D. Pa., April 2, 2012).

In pre-*Burton* decisions, however (one being Petitioner's), the Ninth Circuit has gone the other way. In *Gretzler v. Stewart*, 112 F.3d 992 (1997) – on which the *Leavitt* panel primarily relied – the Ninth Circuit held that the petitioner's conviction was final for purposes of retroactivity despite pending resentencing proceedings because, "[w]here 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." *Id.* at 1004. For this proposition, *Gretzler* in turn relied on *United States v. Judge*, 944 F.2d 523 (9th Cir. 1991), which similarly rejected petitioner's position that her judgment was not final even though she was awaiting resentencing.

In neither *Judge* nor *Gretzler* did the Ninth Circuit refer to the *Berman* line of cases, let alone justify a departure from their definition of finality in criminal cases. Indeed, the *Judge* panel did not cite any Supreme Court precedent for its finality determination. 944 F.2d at 526. And *Gretzler* only cited this Court's statement in *Griffith v. Kentucky*, 479 U.S. 314 (1987), that "[b]y 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Id.* at 321 n.6. However, *Griffith* and its predecessor cases do not address the *Berman* rule that "judgment means sentence" or otherwise answer the question presented in cases where conviction and sentencing appeals are bifurcated. *See Griffith*, 479 U.S. at 328 (deciding whether new rules that are a "clear break" with past rules are retroactively applicable to all criminal prosecutions "pending on direct review or not yet final"); *United States v. Johnson*, 457 U.S. at 543 n.8, 562 (holding that, subject to certain exceptions, Fourth Amendment decisions of this Court are retroactively applicable to all convictions "not yet final at the time the decision was rendered"); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 409 n.3, 419 (1966) (determining the retroactivity of a prior ruling of the Court on the privilege against compulsory self-incrimination); *Linkletter v. Walker*, 381 U.S.

618, 622 n.5, 629 (1965) (setting forth the Court's pre-*Teague* approach to retroactivity).

e. *Conclusion.*

This Court's intervention is warranted in order to clear the confusion among the lower courts and establish that the correct approach to this issue is the one taken by the lower courts in *Miller* and *Jordan* after the decision in *Burton*.

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

Leavitt was first sentenced to death in 1985. At that time, his counsel presented expert testimony regarding possible organic brain damage. Upon the advice of the experts, trial counsel requested that an MRI be performed because the earlier CAT scan results "suggest that further testing should be done on Leavitt in an attempt to determine whether he has an organic or physiological disfunction (sic) of the brain." See App. 91. The only expert who testified in court opined that organicity was crucial to an understanding of Leavitt's future dangerous.

The trial judge denied the MRI request and sentenced Leavitt to death. Trial counsel withdrew, and David Parmenter was appointed to represent Leavitt on appeal. Despite believing that the judge had made "a pretty big error" by not granting the request for the MRI, Parmenter did not raise that issue on the initial appeal. See App. 95. The Idaho Supreme Court reversed the death sentence, finding that Leavitt was "atypical" of other capital defendants, and that the judge had not adequately weighed the mitigating

and aggravating circumstances, and had not fully considered alternative sentences. Parmenter continued to represent Leavitt for the resentencing.

Before the second sentencing hearing, Parmenter conducted absolutely no independent investigation of the mental health issues, hired no investigator, consulted not a single mental health professional to advise him on potential mental health issues, and did not seek funds to complete the testing requested by the mental health professionals during the prior sentencing. See App. 97. Parmenter did not recall that he chose this course of inaction for a specific tactical reason. On the contrary, he candidly acknowledged that filing a funds motion was a "no-lose deal," and that there was no tactical reason behind his failure to request the MRI or consult a mental health expert. In retrospect, he speculated that he might have not sought the funds because the judge had denied the request when it was made during the 1985 sentencing.

By the time of the resentencing Leavitt had four years of good behavior in prison under his belt. If defense counsel had bothered even to *consult* an appropriate expert he would have learned that this corroborated the proposition that Leavitt's explosive behavior had an organic basis. Chief Judge Winmill was "particularly persuaded by Dr. Beaver's opinion that a person with a brain dysfunction will behave much better in a secure and controlled environment than a person whose misbehavior is driven by an aberrant psychological need." See App. 109-10. Because defense counsel chose unilaterally, without any inquiry, to ignore mental health issues, both he and the sentencing judge were ignorant of these facts at the time of the re-sentencing hearing.

At the federal habeas hearing Leavitt provided "uncontradicted expert testimony" that "structural irregularities in the lower right frontal lobe, as here, could result in emotional dysregulation without an accompanying impairment in cognitive functioning." App. 107.

The Ninth Circuit rejected Judge Winmill's *Ake* analysis because it held that Leavitt was not entitled under *Ake* to have an MRI performed. It held that he had already had the benefit of the appointment of a psychologist and a neurologist, but "[b]y its own terms, *Ake* 'limit[ed] the right [it] recognize[d]' to provision of *one* competent psychiatrist.' *Ake*, 470 U.S. at 79 (emphasis added)." *Leavitt*, 646 F.3d at 610.

The dissent in the Ninth Circuit pointed out that *Ake* actually guarantees "a competent psychiatrist who will conduct an appropriate examination ...," 470 U.S. at 83, which under the circumstances of this case required performance of an MRI, *Leavitt*, 646 F.3d at 619. The majority rejected this argument holding that Leavitt had no entitlement to another expert, and if the court had granted him one "it would have been a matter of judicial grace, not constitutional right." *Id.*, 646 F.3d at 611.

The decision of the Ninth Circuit creates a circuit split on whether *Ake* requires an appropriate examination and whether there must be additional mental health examinations when supported by the record. Both the Seventh and Tenth Circuits, and indeed *Ake* itself, authorize the use of additional experts when necessitated by the prior examinations. In *Wilson v. Gaetz*, 608 F.3d 347, 351 (7th Cir. 2010), a court-appointed psychiatrist examined the defendant and found him incompetent. Treatment rendered the defendant

competent, and at trial he advanced an insanity defense. Shortly before the trial began defense counsel reached out to the psychiatrist, who agreed to testify, but pointed out that he had not seen the defendant since the competency exam, and that he had not conducted a sanity exam. The lawyer ignored the doctor's suggestion that he re-interview the defendant and conduct a sanity exam. At trial, as predicted, the psychiatrist "was taken apart in cross examination," 608 F. 3d at 350, and the defendant was convicted. The court found deficient performance and an *Ake* violation because "[the psychiatrist] neither conducted an appropriate examination nor assisted meaningfully in evaluation, preparation, and presentation of Wilson's insanity defense ... ." 608 F. 3d at 351.

Similarly, in *Walker v. Attorney General for State of Oklahoma*, 167 F.3d 1339 (10th Cir. 1999), the petitioner was evaluated for competency by a psychologist who recommended further psychiatric testing. The psychiatrist, in turn, "strongly urged that further neurological testing be conducted because [the petitioner] presented the profile of an individual who often suffers from minimal organic brain disease." *Id.,* 167 F.3d at 1348. The neurologist "recommended that an electroencephalogram be repeated to rule out a seizure disorder, and that [petitioner] be given a CT scan to rule out physical brain abnormalities." *Id.* The Tenth Circuit concluded that "[i]t is clear that due either to lack of time or lack of funds, [petitioner] was denied the opportunity to conduct the additional neurological testing recommended by the experts who examined him before trial." *Id.* The Court further concluded that "the evidence described above presented through the mental health experts was sufficient to trigger the application of *Ake*, and the State

therefore should have provided [petitioner] with the opportunity for the neurological testing those experts recommended." *Id.*

Because the Ninth Circuit opinion is in conflict with decisions from at least two other circuits and the appointment of experts is a continuing issue in most capital sentencing cases, this Court should accept this case to determine the requirements for the appointment of additional mental health experts in capital cases.

## CONCLUSION

For all these reasons, the Court should grant the petition and review the case; or in the alternative, vacate the decision of the Ninth Circuit and remand for further proceedings.

DATED this 10th day of June, 2012.

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