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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RICHARD A. LEAVITT, Petitioner, vs. A.J. ARAVE, Respondent.	)	CASE NO. 1:93-cv-00024-BLW **CAPITAL CASE** RESPONSE TO PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT

COMES NOW, Respondent, A. J. Arave, Warden ("state"), by and through his attorney, L. LaMont Anderson, Deputy Attorney General and Chief, Capital Litigation Unit, and does hereby respond to Petitioner's ("Leavitt") "Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b), Application for Further Stay of Execution, and Supporting Memorandum" (Dkt. 318) by objecting to the same.

BACKGROUND

The facts describing Leavitt's first-degree murder of Danette Elg were not only detailed by the Idaho Supreme Court, State v. Leavitt (Leavitt I), 775 P.2d 599, 601-02 (Idaho 1989), but the Ninth Circuit described the facts and evidence as follows:

> In the small town of Blackfoot, Idaho, on July 17, 1984, the victim of this brutal crime, Danette Elg, was viciously attacked in her own bedroom by a knife-wielding assailant. The relentless and merciless assault took place on her waterbed and with such implacable force that the bed itself was punctured and torn, while the victim sustained numerous cuts and slashes as she fought for her life. She was also stabbed multiple times: One thrust caused the knife to enter her right lung, another the right side of her heart, still another her left lung, and her neck. One even went through her eye and into her brain. Another exceedingly peculiar and unique wound inflicted during this attack was a cut made by the attacker through which he then removed her sexual organs. He did that in a manner that showed that he had some knowledge of female anatomy, for it was done in a manner that is difficult to accomplish.
>
> The evidence pointing to Leavitt was powerful, if not circumstantial - he was not caught redhanded, nor did he confess. Unfortunately, the victim's body was not found for several days which caused the destruction of some evidentiary markers, but gave rise to others.
>
> On the night of July 16, the victim had been severely frightened and shaken when a prowler tried to enter her home. She called the emergency 911 number and the police came, but they found nothing other than signs of attempted entry and a petrified young lady, who thought that Leavitt was the culprit. They then searched the area and the town, but, alas, failed to find Leavitt. Strangely enough, during the period between the murder and the discovery of the body with Leavitt's help, he became exceedingly "interested" in the victim's whereabouts. He finally obtained permission to enter the house with the police and discovered the body. Another strange aspect of the case was that a person supposedly named Mike Jenkins also called the police a couple of times during that period and showed knowledge of details of the crime that only the killer himself would know. Mike Jenkins was not known in Blackfoot and was not heard of thereafter. Leavitt, however, is adept at disguising his voice on the telephone, and could even fool his own wife when he did so.
>
> What else? On the very night of the killing, Leavitt suffered a severe cut to his finger, for which he was treated in an emergency room.

> The killer was also wounded and left behind his blood - Type O - which was mixed with the blood of his hapless victim - Type A. Of all the possible suspects, the only likely source of the Type O blood was Leavitt himself.
>
> How could that damning connection be explained? Well, said Leavitt, he had somehow cut his hand on a fan at the home - a story that was shown to be a lie. At trial he changed that to a story that he had really sustained the cut while preventing his wife from committing suicide. And the crime scene blood? Leavitt could not, at first, imagine how his blood could have been found there, but he had an epiphany by the time of trial. At trial, he managed to recall that a week before the killing he had a nosebleed in the victim's bedroom. That, supposedly, resulted in his blood being mixed with hers when she was killed on her bed a week later. It also supposedly explained how his blood was elsewhere in her room - on the walls and at the window, and even on her underclothes - he wiped his nose on them - as well as on shorts that she had worn between the date of the "nosebleed" and the date of her death. Along the way, Leavitt also tried to send his wife a letter from jail in which he sought to have her memorize a story he had concocted, which would, not surprisingly, tend to exculpate him.

Leavitt v. Arave, 383 F.3d 809, 814-15 (9th Cir. 2004).

After Leavitt was charged with Danette's first-degree murder (State's lodging A-1, p.2), David Parmenter was appointed to represent Leavitt, but Jay Kohler and Ron Hart were subsequently retained by Leavitt and represented him through his first sentencing (Id., pp.17-18). After completion of the trial, a jury convicted Leavitt of first-degree murder and a sentencing enhancement. (State's lodging A-3, pp.815-17.) Finding three statutory aggravating factors and determining the mitigation did not outweigh those factors, the trial court sentenced Leavitt to death. (Id., pp.862-67.)

After Leavitt was sentenced, Parmenter was re-appointed to investigate and conduct post-conviction proceedings and the consolidated appeal. (State's lodging A-3, p.880.) A post-conviction petition was filed, which included claims of ineffective assistance of counsel. (State's lodging B-1, pp.1-3.) After an evidentiary hearing

(State's lodging B-2, pp.3-183), the trial court denied relief expressly explaining why the claims of ineffective assistance of counsel failed (State's lodging B-1, pp.10-18).

On appeal, Leavitt again raised claims of ineffective assistance of trial counsel, which included: (1) failing to call witnesses as requested by Leavitt; (2) failing to effectively move to reopen Leavitt's case to present evidence regarding identification; (3) failing to "actively pursue any alternative argument that the unknown person who drove the blue car may have in fact been the killer"; and (4) failing to object to prosecutorial misconduct during the prosecutor's closing arguments. (State's lodging C-1, pp.1196-1202.) Addressing Leavitt's ineffective assistance of counsel claims, the Idaho Supreme Court concluded, "All of the defendant's asserted deficiencies of counsel deal with disagreements with strategic judgments of his trial counsel." Leavitt I, 775 P.2d at 605. The court further explained, "Even if some of counsel's decisions at trial were erroneous, they must have been so serious as to deprive the defendant of a fair trial. We hold defendant was not denied effective assistance of counsel." Id. (internal citation omitted). However, while affirming his remaining guilt-phase claims and the denial of post-conviction relief, the court reversed Leavitt's death sentence because the trial court 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." Id. at 607.

On remand, Parmenter continued to represent Leavitt. After a resentencing hearing (State's lodging D-2, pp.1-99), the trial court found one statutory aggravating factor, determined the collective mitigation did not outweigh the statutory aggravator, and sentenced Leavitt to death (State's lodging D-1, pp.19-37). Leavitt did not file a

post-conviction petition stemming from the resentencing. The Idaho Supreme Court affirmed Leavitt's death sentence on November 27, 1991. State v. Leavitt (Leavitt II), 822 P.2d 523 (Idaho 1991).

Leavitt filed his initial Petition for Writ of Habeas Corpus on April 29, 1993. (Dkt. 13.) Leavitt's amended petition contains eighteen claims (Dkt. 41), including Claim 9, which raises multiple claims of ineffective assistance of counsel based upon Kohler and Hart's representation of Leavitt at trial, including: (1) failing to object to the prosecutor questioning witnesses, including Leavitt, regarding "the fact that he did not voluntarily submit a sample of his blood and contrasted his behavior to other potential suspects, including his own wife" (id., ¶¶59-62); (2) failing to have Leavitt examined by an independent psychiatric expert prior to trial (id., ¶¶63-65); (3) failing to "investigate and call witnesses to show police bias against Petitioner and to counter the forensic serology evidence introduced by the state" (id., ¶70); (4) failing to "object to the numerous instances of prosecutorial misconduct during trial and closing argument" (id., ¶71); (5) failing to "move for the exclusion of certain evidence including the testimony that Petitioner had a knife while engaging in consensual sexual intercourse with a woman and the improper cross-examination of petitioner by the prosecution" (id.,¶72); and (6) failing to "take adequate measures to extrinsically prove the existence of juror misconduct" (id., ¶73). Leavitt also contended, "Counsel on **appeal and in the post-conviction** proceeding failed to raise numerous issues in those proceedings and failed to investigate properly the claims raised in the post-conviction petition, including, but not

limited to, the trial court's failure to adequately instruct on the presumption of innocence and the requirement for proof beyond a reasonable doubt." (Id., ¶74) (emphasis added).[1]

The state responded by filing an Answer, which asserted numerous claims were procedurally defaulted, including various ineffective assistance of trial counsel claims. (Dkt. 43, pp.6-7.) Leavitt filed a Traverse, asserting his ineffective assistance of counsel claims were "either considered by the court in the first post-conviction petition or defaulted because of the ineffective assistance of counsel on the consolidated appeal and post-conviction petition." (Dkt. 46, p.4.) After addressing Parmenter's alleged ineffectiveness during resentencing, Leavitt further contended, "the application of the state default rule is not an independent and adequate state ground for denial of the claims, [and] even if there exists a valid state ground for denial of the claims there is cause and prejudice for any default." (Id.)

After the parties briefed and orally argued the issue of procedural default (Dkts. 56, 60, 61), this Court rejected Leavitt's contention that I.C. § 19-2719 was not "firmly established" even with respect to ineffective assistance of trial counsel claims. (Id., pp.13-14.) This Court also rejected Leavitt's contention that "counsel's continued representation throughout the post-trial process created a conflict of interest that precluded his attorney from asserting his own incompetence" because Leavitt had new counsel after the trial, and, even if the conflict of interest argument was valid, "because a state prisoner has no Sixth Amendment right to effective assistance of counsel during a state collateral proceeding, counsel's alleged conflicts, failures or omissions in a post-

[1] Leavitt also raised a claim regarding Parmenter's ineffectiveness during the resentencing (Dkt. 41, ¶¶66-69), which, as detailed below, has already been resolved and is not relevant to Leavitt's instant motion.

conviction action can never establish cause." (Id., pp.15-16.) Therefore, the Court dismissed Leavitt's ineffective assistance of counsel claims in Claim 9. (Id., p.19.) Leavitt filed a Motion for Reconsideration or for Leave to Amend (Dkt. 66) seeking reconsideration of the Court's decision regarding ¶74 of the Amended Petition, asking the Court to reconsider its ruling "relating to counsel on appeal" (Dkt. 67, pp.2, 4). Reaffirming the allegations in ¶74 involve ineffective assistance of appellate counsel claims that "do not provide the court with any means of ascertaining with certainty the nature of Plaintiff's IACA claim," this Court denied Leavitt's motion. (Dkt. 69, pp.1, 3.) The Court also denied Leavitt's alternative request to amend ¶74. (Id., pp.4-7.)

This Court subsequently dismissed Leavitt's remaining habeas claims on the merits (Dkt. 120), including, as recognized by the Ninth Circuit, the merits of two of Leavitt's ineffective assistance of trial counsel claims, including, "trial counsel's failure (1) to call the serology expert and (2) to demonstrate prejudice by calling police officers." Leavitt, 383 F.3d at 840, n.40. Leavitt's motion for reconsideration (Dkt. 122) was granted by this Court (Dkt. 141), resulting in habeas relief based upon Jury Instruction 12 and the Court ordering the state to retry Leavitt (Dkt. 142).

Both parties appealed to the Ninth Circuit. (Dkts. 150, 153.) Concluding Leavitt's conviction became final in 1989 after the Supreme 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 this Court's decision regarding Jury Instruction 12 because it violated the new rule prohibition under Teague v. Lane, 489 U.S. 288 (1989). Leavitt, 383 F.3d at 816-826. Based upon Hoffman v. Arave, 236 F.3d 523, 530 (9th Cir. 2001), the Ninth Circuit also reversed this Court's denial of Leavitt's claim of ineffective

assistance of counsel at the resentencing and remanded for consideration of the merits of the claim. Leavitt, 383 F.3d at 839-40. This Court's decision was affirmed in all other aspects, including the decision on the merits of the two ineffective assistance of trial counsel claims. Id. at 840 n.40 ("both claims do lose on the merits, as a defendant's disagreement with his trial counsel's tactical decisions cannot form the basis for an ineffective assistance of counsel claim").

On remand, after an evidentiary hearing (Dkts. 271-75), this Court concluded Leavitt met his burden of establishing ineffective assistance of counsel at the resentencing and conditionally granted habeas relief (Dkt. 296), requiring the state to initiate new sentencing proceedings (Dkt. 297). The state filed a Notice of Appeal (Dkt. 298) and a Motion to Stay (Dkt. 299), which this Court granted "pending the issuance of the mandate from the United States Court of Appeals for the Ninth Circuit" (Dkt. 302, p.2). The Ninth Circuit 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 v. Arave, 646 F.3d 605, 608-16 (9th Cir. 2011). Leavitt's Petition for Rehearing and Rehearing En Banc was denied (Dkt. 311), and the Supreme Court denied certiorari on May 14, 2012 (Dkt. 321).

While Leavitt's Petition for Certiorari was pending, on March 20, 2012, the Supreme Court decided Martinez v. Ryan, --- U.S. ---, 131 S.Ct. 2960 (2011), holding "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." As a result of Martinez, Leavitt filed the instant Rule 60(b) motion (Dkt. 318), contending this "Court's dismissal of Claim 9 because of procedural default was incorrectly decided" (id., p.2), and requesting this Court stay the "State's attempts to set a date of execution." Since filing of his instant motion, Leavitt's execution has been scheduled for June 12, 2012. (Dkt. 327, Appendix A.)

ARGUMENT

A. Introduction

Because Leavitt has raised both of his requests for relief in the same motion – the 60(b) motion and the motion to stay – the state will address both in its response.

Initially, Leavitt's Rule 60(b) motion fails because it constitutes a successive habeas petition and, therefore, this Court is without jurisdiction to grant relief. Additionally, even if the motion is not a successive petition, it fails because Leavitt has failed to establish "extraordinary circumstances." Moreover, Martinez does not apply in Idaho, and even if it does, because Leavitt has not raised ineffective assistance of post-conviction counsel claims that are not themselves procedurally defaulted, such claims cannot constitute cause. Finally, Leavitt's motion fails because he has not demonstrated a "substantial" claim of ineffective assistance of trial counsel or that post-conviction counsel was ineffective.

As to Leavitt's motion for a stay, it is based only upon the "rapid date" of the June 12, 2012 execution date and that it is "not warranted given the significant change in the law which occurred barely fifty days ago." (Dkt. 318, p.14.) This is not the standard for issuance of a stay of execution. Because Leavitt has not met the standard for a preliminary injunction, particularly success on the merits, his motion must be denied.

B. Leavitt Has Failed To Establish He Is Entitled To Relief Based Upon Rule 60(b)

1. Leavitt's Rule 60(b) Motion Is A Successive Habeas Petition

In Gonzalez v. Crosby, 545 U.S. 524, 530 (2005), the Supreme Court addressed the applicability of Rule 60(b) in federal habeas cases and whether it can be used to circumvent 28 U.S.C. § 2244(b)'s prohibition against filing successive habeas petitions. Recognizing "§ 2244(b) applies only where the court acts pursuant to a prisoner's application for a writ of habeas corpus," the Court explained, "for purposes of § 2254(d), an application for habeas corpus relief is a filing that seeks 'an adjudication on the *merits* of the petitioner's claims.'" Id. (quoting Woodford v. Garceau, 538 U.S. 202, 207 (2003) (emphasis in original). 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). Id. at 532 (emphasis in original). Under § 2244(b), "any claim that has already been adjudicated in a previous petition must be dismissed." Gonzalez, 545 at 529-30. "Newly discovered evidence" and "a subsequent change in substantive law" constitute successive petitions even if labeled as a Rule 60(b) motion. Id. at 531. "That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." Id. at 532.

"When no 'claim' is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application." Id. at 533. Gonzalez's Rule 60(b) motion was based upon new law under Artuz v. Bennett, 531 U.S. 4 (2000), and a request to reconsider whether his petition was barred by the AEDPA's one-year statute of limitation. Gonzalez, 545 U.S. at 527-28. Concluding a Rule 60(b) motion

challenging only a previous ruling on the AEDPA's statute of limitation "is not the equivalent of a successive petition," the Court concluded the Eleventh Circuit erred by concluding Gonzalez "did not qualify even to seek Rule 60(b) relief." Id. at 535.

Leavitt's motion is in stark contrast because it does not involve the AEDPA's statute of limitation. Additionally, "'the dismissal of a first petition with prejudice because of a procedural default (and a failure to show cause and prejudice) forecloses the possibility that the underlying claims will be addressed by a federal court.... Such a dismissal therefore constitutes a disposition on the merits and renders a subsequent petition second or successive for purposes of 28 U.S.C. § 2244(b).'" Pizzuto v. Blades, 673 F.3d 1003, 1008 (9th Cir. 2012) (quoting McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009)). Moreover, Leavitt is asking this Court to reexamine ineffective assistance of counsel claims, some of which have been previously addressed on their merits. Because his motion constitutes a successive petition, this Court is without jurisdiction to grant relief. *See* 28 U.S.C. § 2244(b)(3); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001) (district courts lack jurisdiction to consider unauthorized successive petitions).

2. Legal Framework Of Rule 60(b) Motion

While further consideration of Leavitt's motion is not warranted, the state will address the merits of his motion. Federal Rule of Civil Procedure 60(b) permits reconsideration for "any other reason justifying relief from the operation of the judgment." As explained in Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998), Rule 60(b)(6), "is a catch-all provision that allows a court to vacate a judgment for 'any other reason justifying relief from the operation of the judgment.'" The rule "gives the district court power to vacate judgments whenever such action is appropriate to

accomplish justice." Allmerica Financial Life Insurance and Annuity Co. v. Llewellyn, 139 F.3d 664, 666 (9th Cir. 1997) (quoting Klapprott v. United States, 335 U.S. 601, 615 (1949)). However, "such relief requires a showing of 'extraordinary circumstances.'" Id. (quoting Ackermann v. United States, 340 U.S. 193, 199-201 (1950)); *see also* Gonzalez, 545 U.S. at 534 ("our cases have required a movant seeking relief under rule 60(b)(6) to show 'extraordinary circumstances' justifying the reopening of a final judgment"). The "moving party must 'show both injury and that circumstances beyond its control prevented timely action to protect its interest.' [*United States v. Alpine Land & Reservoir, Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993).] Neglect or lack of diligence is not to be remedied through Rule 60(b)(6)." Lehman, 154 F.3d at 1017.

In Lopez v. Ryan, 2012 WL 1676696, *4-6 (9th Cir. 2012) (citing Phelps v. Alameida, 569 F.3d 1120 (9th Cir. 2009)), the Ninth Circuit recently discussed the six factors that may be used in determining "extraordinary circumstances," including, (1) "the nature of the intervening change in the law"; (2) "petitioner's exercise of diligence in pursuing the issue during the federal habeas proceedings"; (3) interest in finality; (4) "delay between the finality of the judgment and the motion for Rule 60(b)(6) relief"; (5) "the degree of connection between [Petitioner's] case and [the intervening change in law]"; and (6) comity. While these factors are not a "rigid or exhaustive checklist," the court recognized it has "cautioned against the use of provisions of Rule 60(b) to circumvent the strong public interest in the timeliness and finality of judgments." Phelps, 569 F.3d at 1135 (internal quotations, citations, and brackets omitted).

3. Leavitt Has Failed To Establish Extraordinary Circumstances

a. Intervening Change In The Law

In Lopez, 2012 WL 1676696, *4 (emphasis added), the Ninth Circuit addressed the first factor and concluded:

> The nature of the intervening change of law at issue here differs from the situations at issue in *Gonzalez* and *Phelps*. Here, it was settled law that post-conviction counsel's effectiveness was irrelevant to establishing cause for procedural default. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). In *Martinez*, 132 S.Ct. at 1315, however, the Supreme Court "qualifie[d] *Coleman* by recognizing a narrow exception." In our view, these circumstances **weigh slightly** in favor of reopening Lopez's habeas case. Unlike the "hardly extraordinary" development of the Supreme Court resolving an existing circuit split, *Gonzalez*, 545 U.S. at 536, the Supreme Court's development in *Martinez* constitutes a remarkable—if "limited," *Martinez*, 132 S.Ct. at 1310 – development in the Court's equitable jurisprudence.

While the state respectfully disagrees with the Ninth Circuit's assessment that "it was settled law that post-conviction counsel's effectiveness was irrelevant to establishing cause for procedural default," id., the state recognizes this Court is bound by the Ninth Circuit's decision.[2]

b. Leavitt's Exercise Of Due Diligence

In addressing this factor, the Ninth Circuit explained, "we must consider [Leavitt's] diligence in pursuing his current theory that his PCR counsel's performance provided cause for [Leavitt's] failure to develop, before the state courts, the factual record concerning his trial counsel's ineffectiveness." Lopez, 2012 WL 1676696 at *4.

[2] As recognized in Martinez, 132 S.Ct. at 1315, Coleman "left open . . . a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provides the first occasion to raise a claim of ineffective assistance at trial." While the Court declined to address "whether that exception exists as a constitutional matter," Martinez, at 1315, because the issue was "left open" it does not appear to have been as "settled" as determined by the Ninth Circuit in Lopez.

The state is unaware of Leavitt having pursued his new found theory for cause in any court. Before the Ninth Circuit Leavitt contended, "Idaho's procedural default rules unreasonably restrict the ability of Idaho prisoners to raise ineffective assistance of counsel claims." Leavitt, 383 F.3d at 839. While the court also noted Leavitt "claims ineffective assistance of counsel at state post-conviction proceedings," id. at 839 n.39, if such a claim was raised, it was not in the context of cause to overcome the procedural default associated with trial counsel's alleged ineffectiveness (Appendix B, pp.84-94).

Moreover, as in Lopez, Leavitt had the opportunity, "[i]n this same time frame, . . . like Martinez," to challenge Coleman. In fact, because Leavitt twice petitioned the Supreme Court for certiorari from Ninth Circuit decisions, he had an even greater opportunity to challenge Coleman; he simply failed to exercise sufficient diligence to present the claim before the Supreme Court either time. (Appendices C, D.) Because Leavitt was not diligent in pursuing this argument, the second factor weighs against him.

c. Finality

Addressing the finality factor, the Ninth Circuit recognized, "The State's and the victim's interest in finality, especially after a warrant of execution has been obtained and an execution date set, weigh against granting post-judgment relief." Lopez, 2012 WL 1676696 at *5. Likewise, a death warrant has been issued in Leavitt's case and the guilt portion of his case has been pending since he was convicted by a jury on September 25, 1985. (State's lodging A-3, pp.815-17.) "This factor does not support reopening [Leavitt's] habeas case." Lopez, 2012 WL 1676696 at *5.

d. Delay Between Judgment And Motion

The fourth factor involves the delay between the finality of the habeas judgment and the Rule 60(b)(6) motion. Lopez at *6. In Leavitt's case, the habeas judgment was presumably final when the Supreme Court denied certiorari on May 14, 2012; his motion was filed prior to the Supreme Court's decision. As in Lopez, "the relatively short period between the finality of [Leavitt's] federal habeas proceedings and his rule 60(b) motion weighs in favor of reopening [Leavitt's] case." 2012 WL 1676696 at *5.

e. Connection Between Leavitt's Case And *Martinez*

"The fifth consideration pertains to the degree of connection between [Leavitt's] case and *Martinez*." Lopez, 2012 WL 1676696 at *5. The court again looked at Phelps, and recognized, "'the intervening change in the law directly overruled the decision for which reconsideration had been sought,'" which was a "fact support[ing] reconsideration." Lopez at *5 (quoting Phelps, 569 F.3d at 1139). However, the court recognized it had previously addressed Lopez's claims on the merits and that "[g]iven the difference between procedural default and § 2254(e)(2), and the potentially significant legal difference between those doctrines, this factor does not weigh in favor of reopening Lopez's case." Lopez at *5. Likewise, this factor does not weigh in Leavitt's factor.

f. Comity

Examining the comity factor, the court explained, "In light of our previous opinion and those of the various courts that have addressed the merits of several of Lopez's claims, and the determination regarding Lopez's lack of diligence, the comity factor does not favor reconsideration." Lopez, 2012 WL 1676696 at *6. The same is

true for Leavitt's case. The courts have addressed the merits of several of Leavitt's ineffective assistance of trial counsel claims and he has not demonstrated diligence. Therefore, the sixth factor weighs against Leavitt.

In light of the multiple factors that strike against reopening Leavitt's case, his Rule 60(b) motion fails.

C. Leavitt Has Failed To Establish He Is Entitled To Relief Based Upon *Martinez*

1. *Martinez* Is Inapplicable In Idaho

In Martinez, 132 S.Ct. at 132, the Supreme Court held, "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."

The Supreme Court emphasized the "limited" nature of Martinez, 132 S.Ct. at 1320 (emphasis added), explaining:

> [T]he limited nature of the qualification to *Coleman* adopted here reflects the importance of the right to the effective assistance of trial counsel and Arizona's decision to **bar defendants** from raising ineffective-assistance claims on direct appeal. Our holding here addresses only the constitutional claims presented in this case, where the **State barred** the defendant from raising the claims on direct appeal.

In Idaho, while "it is generally inappropriate to raise a claim of ineffective assistance of counsel on direct appeal from the judgment of conviction," State v. Mitchell, 859 F.2d 972, 973-74 (Idaho Ct. App. 1993), such claims are not "barred," particularly when they can be resolved based upon the available record, *see* State v.

Darbin, 708 P.2d 921, 928 (Idaho Ct. App. 1985). Because ineffective assistance of trial counsel claims are not "barred" on direct appeal in Idaho, Martinez is inapposite.

2. Because Leavitt's Ineffective Assistance Of Post-Conviction Counsel Claims Are Also Procedurally Defaulted, They Cannot Constitute Cause

In his Rule 60(b) motion, Leavitt does not detail how his post-conviction attorney, David Parmenter, was ineffective or how his alleged ineffectiveness is the cause of the default and trial counsels' alleged ineffectiveness. Irrespective, because Leavitt has never raised a claim of ineffective assistance of post-conviction counsel that is not or would not itself be procedurally defaulted, such claims cannot constitute cause to overcome ineffective assistance of trial counsel claims since the ineffective assistance of post-conviction counsel claims are themselves procedurally defaulted. As explained in Edwards v. Carpenter, 529 U.S. 445, 451 (2000) (emphasis in original), "ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim." *See also* Murray v. Carrier, 477 U.S. 478, 489 (1989). There is certainly nothing in Martinez establishing Edwards and Carrier do not apply to claims of ineffective assistance of post-conviction counsel. As recognized by the Supreme Court, "The procedural default doctrine and its attendant cause and prejudice standard are grounded in concerns of comity and federalism, and apply alike whether the default in question occurred at trial, on appeal, or on state collateral attack. Edwards, 529 U.S. at 451 (internal quotations and citations omitted). As with other ineffective assistance of counsel claims, if claims of ineffective assistance of post-conviction counsel are themselves unexhausted or procedurally defaulted, "it could hardly be said that, as comity and federalism require, the State had

been given a *fair* opportunity to pass upon [Leavitt's claims]." Id. (internal quotations and citation omitted) (emphasis in original).

Moreover, Leavitt has failed to establish any causal connection between any alleged ineffective assistance of post-conviction counsel claim and ineffective assistance of trial counsel claims. As explained in Carrier, 477 U.S. at 488 (emphasis added), "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." *See also* Rose v. Kelly, 2010 WL 2926004, *9 (N.D. Ohio 2010) ("ineffective assistance of counsel may only be invoked as cause for procedural default when there is a causal nexus between the deficient representation and the purported default"); Phillips v. Mahoney, 2010 WL 49811, *5 (D. Mont. 2010) ("he draws no causal connection between counsel's performance and his own failure to file his postconviction petition on time"). As recognized by the Ninth Circuit, "Ineffective assistance of counsel may be cause to excuse a default only if the procedural default was the result of an independent constitutional violation." Cook v. Schriro, 538 F.3d 1000, 1027 (9th Cir. 2008); *see also* Oxford v. Delo, 59 F.3d 741, 747 (8th Cir. 1994) ("we reject this argument because we fail to see any causal connection between trial counsel's performance and Oxford's failure to verify his amended Rule 29.15 motion").

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

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

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

a. Standards Of Law Regarding Ineffective Assistance Of Counsel

Ineffective assistance of counsel claims are governed by Strickland. The purpose of effective assistance of counsel "is not to improve on the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial." Cullen v. Pinholster, --- U.S. ---, 131 S.Ct. 1388, 1403 (2011) (quoting Strickland, 466 U.S. at 689). To prevail on a claim of ineffective assistance of counsel, Leavitt must show his counsels' representation was deficient and that the deficiency was prejudicial. Strickland, 466 U.S. at 687.

The first element "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. In making this determination, there is a strong presumption that counsel's performance fell within the "wide range of professional assistance." Id. at 689; *see also* Sexton, 2012 WL 1760304, *7 (quoting Strickland, 466 U.S. at 739 ("We

strongly presume 'that counsel's representation was within the wide range of reasonable professional assistance'"). Leavitt has the burden of showing counsel's performance "fell below an objective standard of reasonableness." Id. at 688. The effectiveness of counsel's performance must be evaluated from his perspective at the time of the alleged error, not with twenty-twenty hindsight. Id. at 689. "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." Harrington v. Richter, --- U.S. ---, 131 S.Ct. 770, 788 (2011) (internal quotations and citation omitted). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Richter, 131 S.Ct. at 788 (internal quotations and citation omitted).

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

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

The second element requires Leavitt to show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466

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

Overcoming Strickland's "high bar is never an easy task." Padilla v. Kentucky, 559 U.S. ---, 130 S.Ct. 1473, 1485 (2010). Because ineffective assistance of counsel claims provide a means to raise issues not presented at trial, the Strickland standard "must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve." Richter, 131 S.Ct. at 788 (internal quotations and citation omitted). The reviewing court need not address both prongs of Strickland if an insufficient showing is made under only one prong. Strickland, 466 U.S. at 697.

b. Questioning Of Witnesses Regarding Leavitt's Unwillingness To Voluntarily Submit A Blood Sample

In his first claim, Leavitt contends trial counsel was ineffective for failing to object to questions from the prosecutor regarding Leavitt's unwillingness to voluntarily submit a blood sample. (Dkt. 41, pp.19-20, ¶¶59-62.) Irrespective of whether this claim was raised as an ineffective assistance of trial counsel claim during state court

proceedings and is procedurally defaulted, Leavitt has failed to demonstrate either deficient performance or prejudice because the Ninth Circuit rejected this claim under the Due Process Clause. Leavitt, 383 F.3d at 828. While recognizing the Ninth Circuit has "indicated that, taken by themselves, comments on the exercise of one's Fourth Amendment rights are improper," the court noted a theme of Leavitt's defense was "cooperation," and "[b]efore there was ever any mention of the blood test, [he] had already launched himself on this theme of cooperation." Id. Therefore, "[r]egardless of whether that Fourth Amendment rule should generally apply to habeas corpus cases, Leavitt's particular objection is answered by the much more banal and obvious rule that admission of the evidence was proper to attack his claim of cooperation" and the "prosecutor was entitled to question that theme by showing that the leitmotiv was actually one of resistance." Id.

In light of the Ninth Circuit's decision regarding the substantive due process claim, Leavitt cannot establish trial counsels' performance was deficient or prejudicial because any objection would have been properly rejected. Moreover, "the court must indulge a strong presumption that [counsel acted] for tactical reasons rather than through sheer neglect. This presumption takes on particular force where, as here, a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive." Cheney v. Washington, 614 F.3d 987, 996 (9th Cir. 2010) (internal quotes and citation omitted) (rejecting an ineffective assistance of counsel claim based upon trial counsel's failure to object to the prosecutor's questions during cross-examination).

Based upon the Ninth Circuit's decision regarding the substantive due process claim, the presumptions Leavitt has failed to overcome, and his failure to establish any prejudice as a result of the questioning, his first claim not only fails to meet the Martinez test for a "substantial" claim, it fails on the merits.

c. Failing To Have Leavitt Examined By Psychiatric Expert

In his second ineffective assistance of counsel claim, Leavitt contends trial counsel were ineffective because they did not have him examined by an independent psychiatric expert prior to trial. (Dkt. 41, pp.20-21, ¶¶63-65.) This claim was exhaustively examined by this Court as a resentencing claim and rejected by the Ninth Circuit under both Strickland prongs. Leavitt, 646 F.3d at 608-16. While much of the Ninth Circuit's analysis is applicable to the trial counsel claim, particularly regarding the court's prejudice analysis, it fails on its own merits.

On December 19, 1985, trial counsel reminded the trial court that at the first sentencing hearing they orally moved for a new trial based upon the testimony of Dr. David Groberg. (State's lodging A-20, p.2405.) Upon renewing their motion, counsel also submitted the subsequent affidavit of Dr. Clark Jaynes "that Mr. Leavitt was and is suffering from a mental disease or defect, possibly organically originating, that would virtually make it impossible for him to premeditate the crime of Murder. And that is one of the essential elements of the crime of First Degree Murder." (Id.) Denying Leavitt's new trial motion, the trial court explained:

> One of the things that Defendant faces in this case is a complete denial of having committed the crime or having any participation in it. And the evidence that you talk about really has no bearing on any posture taken by the Defendant at the trial.

> The Court also feels that the evidence that you speak of does not go towards a showing that the Defendant did not have the capability of committing the crime. So I'd deny the motion, Mr. Kohler.

(Id., pp.2407-08.)

The trial court's denial of expert assistance for trial purposes was correct. As alluded to in Leavitt, 646 F.3d at 612, "Evidence of mental health may have detracted from, or even conflicted with" Leavitt's trial strategy of "I didn't do it." In Mickey v. Ayers, 606 F.3d 1223, 1237-38 (9th Cir. 2010), the court recognized a mental health defense can be inconsistent with a self-defense theory. In Turk v. White, 116 F.3d 1264, 1266-67 (9th Cir. 1997), the court concluded counsel was not even required to investigate a mental health defense after deciding to present a defense based upon self-defense, which counsel believed was petitioner's "strongest defense" because "[p]ursuit of these conflicting theories would have confused the jury and undermined whatever chance Turk had of an acquittal." Id. at 1266; *see also* Williams v. Woodford, 384 F.3d 567, 611-12 (9th Cir. 2004) (reasonably selecting an alibi defense as the primary defense obviated the duty to investigate a conflicting mental-state defense); Bean v. Calderon, 163 F.3d 1073, 1081-82 (9th Cir. 1998) (counsel's reasonable choice of an alibi defense ended counsel's duty to investigate a conflicting defense of diminished mental capacity); Correll v. Stewart, 137 F.3d 1404, 1411 (9th Cir. 1998) (defense counsel was not ineffective for failing to present psychiatric evidence that would have contradicted the primary defense of misidentification).

Likewise, pursuit of a mental health defense when Leavitt was contending he was not even present when Danette was murdered "would have confused the jury and undermined whatever chance [he] had of an acquittal." As recognized by the Idaho

Supreme Court in rejecting Leavitt's motion for new trial, "During all of the original trial proceedings the defendant denied involvement with the killing of the victim. That is a completely different defense than [the] one now asserted which admits the criminal act, but denies culpability on the ground of inability to form the requisite intent." Leavitt I, 775 P.2d at 605. Because of the inconsistent nature of the two defenses, Leavitt's claim not only fails to meet the Martinez test for a "substantial" claim, it fails on the merits.

d. Failing To Call Witnesses Regarding Police Bias And Counter Serology Evidence

The entirety of Leavitt's third ineffective assistance of trial counsel claim reads, "Trial counsel failed to investigate and call witnesses to show police bias against Petitioner and to counter the forensic serology evidence introduced by the state." (Dkt. 41, p.23, ¶70.) As recognized by the Ninth Circuit, it appears this claim was addressed by this Court on the merits and rejected as an ineffective assistance of trial counsel claim. Leavitt, 383 F.3d at 840 n.40. Irrespective, it would again fail because of its conclusory nature, any decision regarding witnesses was strategic, the serology evidence was investigated and a tactical decision made not to call the expert who examined the evidence, and Leavitt has failed to establish prejudice.

In James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994), the petitioner contended his attorney was ineffective when he failed to present some evidence. The Ninth Circuit recognized the petitioner failed to identify what evidence counsel should have presented, and explained, "conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief." Id. In Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995), because the petitioner failed to provide any reference to the record or documents

explaining the content of the witness' arrest record, this same principle was applied to a claim that a prosecutor withheld exculpatory evidence. In United States v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1989), the court rejected a claim of ineffective assistance based upon counsel failing to call witnesses, concluding the defendant "offer[ed] no indication of what these witnesses would have testified to, or how their testimony might have changed the outcome of the [trial]." *See also* Moss v. Hofbauer, 286 F.3d 851, 868-69 (6th Cir. 2002) (rejecting an ineffective assistance claim based upon counsel's failure to call defense witnesses because "he does not identify any witnesses that his counsel should have called"). Moreover, in United States v. Harden, 846 F.2d 1229, 131-32 (9th Cir. 1988), the court rejected a claim of ineffective assistance of counsel because there was no evidence in the record establishing the witnesses would testify.

Leavitt's claim is conclusory; he has failed to identify which witnesses trial counsel should have had testify, the content of the witnesses' testimony, or whether they were willing to testify. Even if the witnesses were identified and the content of their testimony disclosed, because the determination of which witnesses to call at trial is a strategic decision that is generally unassailable in habeas, Leavitt's claim fails. *See* Lord v. Wood, 184 F.3d 1083, 1095 (9th Cir. 1999) ("Few decisions draw so heavily on professional judgment as whether or not to proffer a witness at trial"). Based upon the vague nature of his claim, his failure to overcome the strong presumption that trial counsels' performance fell within the wide range of professional assistance, and his failure to establish a reviewing court could not have confidence in the outcome of his trial, Leavitt's claim fails.

Leavitt's claim regarding challenging the serology evidence is likewise misguided. 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." (State's lodging B-2, pp.153-54.) During post-conviction proceedings, Jay Kohler, one of Leavitt's trial attorneys, discussed Dr. Blake's involvement:

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

(Id., p.154.) 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.155.)

Not only has Leavitt failed to meet the Martinez test for a "substantial" claim, his third ineffective assistance of trial counsel claim fails on the merits.

e. Failing To Object To Prosecutorial Misconduct

The entirety of Leavitt's fourth ineffective assistance of trial counsel claim reads, "Trial counsel failed to object to the numerous instances of prosecutorial misconduct during trial and closing arguments." (Dkt. 41, p.23, ¶71.) Leavitt then referenced Claim

10 from his First Amended Petition, which raised multiple due process claims based upon prosecutorial misconduct. (Dkt. 41, pp.23-27.) However, like his first ineffective assistance of trial counsel claim, the Ninth Circuit addressed the substantive due process claims Leavitt raised in Claim 10. For example, discussing the prosecutor's questions regarding Leavitt's Fifth Amendment right to remain silent, the Ninth Circuit concluded the questions were admissible because Leavitt did not remain silent and, therefore, the prosecutor was permitted to point out inconsistencies. Leavitt, 383 F.3d at 827. The court also concluded any questions regarding the "special inquiry" were harmless. Id. at 828. Regarding "undisclosed and lost evidence," the court reasoned, "Even if there were some error, it was entirely harmless; it simply is not reasonably probable that the result of the proceeding would have been any different if Leavitt had obtained the information in question." Id. at 831. Addressing the prosecutor's closing arguments, the court explained there was either no misconduct or it did not violate due process. Id. at 833-35. Because these substantive due process claims were unsuccessful, Leavitt cannot succeed by merely repackaging them as ineffective assistance of trial counsel claims. Because the claims fail on their merits, they also fail Martinez's substantive claim test.

f. Failing To Move For Exclusion Of Evidence

In his fifth ineffective assistance of trial counsel claim, Leavitt contends trial counsel should have moved to exclude the testimony that he "had a knife while engaging in consensual sexual intercourse with a woman and the improper cross-examination of Petitioner by the prosecution." (Dkt. 41, p.23, ¶72.) Presumably, Leavitt is referring to Barbara Rich who testified at the trial regarding a letter she wrote and gave to Leavitt detailing a prior sexual encounter between them. (State's lodging A-17, pp.1640-49.) It

was this letter which Leavitt claimed caused his wife to attempt suicide, precipitating the cut on his finger. (Id. at pp.1682-90.) On cross-examination, the prosecutor inquired about the incident described in the letter, including Leavitt's production of a knife immediately prior to their having intercourse. (Id. at 1645-48.) Counsel did not object to the testimony. The knife was never recovered or ruled out as a possible murder weapon. (State's lodging A-18, pp.1928-29.)

Not only did the Ninth Circuit address this issue in the context of the Fourth Amendment, Leavitt, 383 F.3d at 828 n.16, it was also addressed in the context of due process with the court concluding evidence of the knife was relevant to identifying the killer and even if there was error, it was harmless. Id. at 829. In light of the Ninth Circuit's decision, Leavitt cannot demonstrate either deficient performance or prejudice. Moreover, based upon the other "knife evidence" that was admitted at trial, it is likely trial counsel tactically chose not to object to this evidence and highlight it before the jury. Based upon the presumption that it was a tactical decision not to challenge this evidence, particularly in light of the trial court's other rulings regarding knife evidence, Leavitt cannot establish deficient performance. However, irrespective, Leavitt cannot establish prejudice, particularly in light of the other "knife evidence" that was presented to the jury. Exclusion of Rich's testimony simply would not have changed the outcome of Leavitt's trial because he was convicted based upon the forensic evidence and his repeated lies, not the de minimus testimony regarding a prior sexual encounter.

Based upon the Ninth Circuit's decision and the failure of this claim on the merits as an ineffective assistance of trial counsel claim, not only has Leavitt failed to establish a

"substantive claim" under Martinez, he has failed to establish the claim has any merit as a Sixth Amendment claim.

g. Failing To Prove Juror Misconduct

Leavitt's sixth ineffective assistance of trial counsel claims reads in its entirety as follows, "Trial counsel failed to take adequate measures to extrinsically prove the existence of juror misconduct, *see* Claim 15, below." (Dkt. 41, p.23, ¶74.) Presumably, based upon the reference to Claim 15, Leavitt is referring to juror Jerri Bergeman. (Dkt. 41, pp.36-37.) While the Ninth Circuit did not address a substantive due process claim of juror misconduct because it was not raised, this Court recognized, after an evidentiary hearing, that the claim was without merit. (Dkt. 120, pp.114-97.) In light of the evidentiary hearing that was held by this Court and this Court's ruling, it is simply impossible for Leavitt to establish ineffective assistance of trial counsel based upon any alleged misconduct by Bergeman. Therefore, not only has Leavitt failed to establish a "substantive claim" under Martinez, he has failed to establish the claim has any merit as an ineffective assistance of trial counsel claim.

h. Jury Instructions

In his motion, Leavitt also contends trial counsel were ineffective for failing to challenge "the erroneous instructions on the presumption of innocence, reasonable doubt and alibi." (Dkt. 318, p.12.) While a claim was raised in Leavitt's First Amended Petition regarding the jury instructions, it was not under the guise of ineffective assistance of trial counsel, but due process under the Fourteenth Amendment. (Dkt. 41, pp.27-31.) Moreover, while a jury instruction claim was raised regarding the alleged

ineffectiveness of post-conviction and appellate counsel (Dkt. 41, p.23, ¶74), no claim was raised regarding **trial** counsel's alleged ineffectiveness involving jury instructions.

However, even if such a claim had been raised, it would have also failed. Instruction 12, which forms the primary 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.

(State's lodging A-3, p.772.)

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.

(Id., p.770.) When read to the jury, the trial court added an additional sentence, "There must be proof beyond a reasonable doubt." (State's lodging A-12, p.506.)

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.

(State's lodging A-3, p.771.)

Instruction 13 reads as follows:

> 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.

(Id., p.773.)

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.

(Id., p.797.)

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.

(Id., p.800.)

As with most of Leavitt's other ineffective assistance of trial counsel claims, the Ninth Circuit addressed, albeit in the context of due process, his jury instruction claims and concluded there was no error or any alleged error was harmless. Addressing the trial

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

Admittedly, it appears the court did not expressly address the merits of Instruction 12 because the claim was barred under Teague v. Lane, 489 U.S. 288 (1989). However, in Rhoades v. Henry, 638 F.3d 1027, 1043-45 (9th Cir. 2011), 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, 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 establish a due process claim based upon Instruction 12 and, therefore, cannot establish ineffective assistance of trial counsel, particularly with respect to prejudice.

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

As the Supreme Court explained, "When faced with the question whether there is cause for an apparent default, a State may answer . . . that the attorney in the initial-

review collateral proceeding did not perform below constitutional standards." Martinez, 132 S.Ct. at 1319. While the Supreme Court did not provide extensive guidance regarding the standards associated with ineffective assistance of post-conviction counsel, it is clear the two-prong test from Strickland guides post-conviction counsel's performance. Martinez, 132 S.Ct. at 1318. However, as further explained in Sexton, 2012 WL 1760304, *5 (citing Knowles v. Mirzayance, 556 U.S. 111, 127 (2009)), post-conviction counsel "is not necessarily ineffective for failing to raise even a nonfrivolous claim," let alone a claim that is meritless. In other words, the standard for ineffective assistance of post-conviction counsel is analogous to the standard for ineffective assistance of appellate counsel, where there is clearly a Sixth Amendment right to effective assistance of counsel but no obligation to raise every nonfrivolous claim. Jones v. Barnes, 463 U.S. 745, 751-52, (1983). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. Addressing the Strickland test, the Ninth Circuit has explained:

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

Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1984) (internal quotations and citations omitted). Based upon these standards, while it is still possible to raise ineffective assistance of appellate counsel claims, "it is difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288.

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

D. Leavitt Has Failed To Establish He Is Entitled To A Preliminary Injunction Associated With His Execution Date

Leavitt has not articulated any standard for a stay or preliminary injunction associated with his execution date, but merely contends the "rapid date" of his execution, "after almost twenty years of litigation, is not warranted given the significant change in the law which occurred barely fifty days ago" in Martinez. However, the test for a preliminary injunction is not the length of time a case has been litigated or "the significant change in law." In Rhoades v. Reinke, 671 F.3d 856, 858-59 (9th Cir. 2011) (quoting Beaty v. Brewer, 649 F.3d 1071, 1072 (9th Cir. 2011)), the Ninth Circuit reaffirmed the standards for granting a preliminary injunction, explaining:

> To obtain relief, [Leavitt] "must demonstrate (1) that he is likely to succeed on the merits of such a claim, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.

Based upon the arguments above, Leavitt's request for a stay or preliminary injunction must be denied because he is not likely to succeed on the merits of his claims. As explained in Rhoades, 671 F.3d at 863, that failure alone requires injunctive relief be

denied. Therefore, because he has failed to establish likely success on the merits of his Rule 60(b) motion, his request for injunctive relief must be denied.

CONCLUSION

The state respectfully requests that Leavitt's "Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b), Application for Further Stay of Execution, and Supporting Memorandum" be denied.

DATED this 23rd day of May, 2012.

/s/
L. LaMONT ANDERSON
Deputy Attorney General and
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on or about the 23rd day of May, 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 Nevin, Benjamin, McKay & Bartlett P.O. Box 2772 Boise, ID 83701	____	U.S. Mail Hand Delivery Overnight Mail Facsimile Electronic Court Filing
	X	
Andrew Parnes Law Office of Andrew Parnes P.O. Box 5988 Ketchum, ID 83340	____	U.S. Mail Hand Delivery Overnight Mail Facsimile Electronic Court Filing
	X	

/s/
L. LaMONT ANDERSON