APPENDIX A

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

STATE OF IDAHO Plaintiff, vs. RICHARD A. LEAVITT, Defendant.	)	CASE NO. CR-1985-4110 DEATH WARRANT

TO: Brent Reinke, Director of the Idaho Department of Correction, and Randy Blades, Warden, Idaho Maximum Security Institution:

WHEREAS, the above-named Defendant, on the 25th day of September, 1985, was found guilty by a jury of the crime of First-Degree Murder as charged in the prosecutor's Amended Information; and,

WHEREAS, on the 19th day of December, 1985, this Court made and entered its Pronouncement of Sentence, finding that Defendant is guilty of Murder in the First-Degree and imposing the sentence of Death; and,

WHEREAS, on the 8th day of January, 1986, this Court made and entered its Judgment of Conviction, finding that Defendant is guilty of Murder in the First-Degree and imposing the sentence of Death; and,

WHEREAS, on the 1st day of May, 1987, this Court entered an order denying Defendant's Petition for Post-Conviction Relief; and,

WHEREAS, on the 30th day of May 1989, the Idaho Supreme Court issued its opinion upholding the conviction and denial of post-conviction relief stemming from conviction, but reversing the death sentence and remanding for resentencing; and,

WHEREAS, after a resentencing hearing, on the 25th day of January, 1990, this Court signed its Memorandum Decision and Findings of the Court in Considering the Death Penalty, finding that Defendant is guilty of Murder in the First-Degree and imposing the sentence of Death, which was filed on the 29th day of January, 1990; and,

WHEREAS, on the 15th day of March, 1990, this Court signed the Judgment of Conviction and Sentencing Order, finding that Defendant is guilty of Murder in the First-Degree and imposing the sentence of Death, which was filed on the 6th day of April, 1990; and,

WHEREAS, on the 27th day of November, 1991, the Idaho Supreme Court issued its opinion upholding the death sentence; and,

WHEREAS, this Court has entered orders denying all of Defendant's successive and subsequent petitions for post-conviction and other state collateral relief; and,

WHEREAS, the Idaho Supreme Court has affirmed the denial of Defendant's successive and subsequent petitions for post-conviction and other state collateral relief; and,

WHEREAS, on the 14th day of December, 2000, the Honorable B. Lynn Winmill entered Judgment granting Defendant federal habeas relief and ordering the state to initiate new trial proceedings; and,

WHEREAS, on the 14th day of June, 2004, the United States Court of Appeals for the Ninth Circuit,reversed the granting of federal habeas relief requiring the initiation of new trial proceedings, but remanded for consideration of Defendant's ineffective assistance of counsel claims arising from his resentencing; and,

WHEREAS, on the 28th day of September 2007, the Honorable B. Lynn Winmill entered Judgment granting Defendant federal habeas relief and ordering the state to initiate new sentencing proceedings; and;

WHEREAS, on the 17th day of May, 2011, the United States Court of Appeals for the Ninth Circuit reversed the granting of federal habeas relief requiring the initiation of new sentencing proceedings; and,

WHEREAS, on the 14th day of May, 2012, the United States Supreme Court denied Defendant's petition for certiorari, and;

WHEREAS, on the 16th day of May, 2012, the United States Court of Appeals for the Ninth Circuit issued its Mandate, which automatically lifted any stay imposed by Judge B. Lynn Winmill; and,

WHEREAS, Idaho Code § 19-2715(2) mandates that upon a remittitur or mandate being issued after a sentence of death has been affirmed, the district court shall set a new execution date; and,

WHEREAS, the Court is not aware of the existence of any stay of execution or other legal impediment to execution of the judgment.

NOW THEREFORE, YOU ARE HEREBY COMMANDED, pursuant to Idaho Code § 19-2716 and the Judgment of this Court, to receive said Defendant into your custody, and on the 12 day of June, 2012, you shall cause the execution of said sentence of death to take place, unless said sentence is stayed by law, and that you shall make a return upon this Death Warrant, showing the time, mode and manner in which it was executed pursuant to Idaho Code § 19-2718.

DATED this 17 day of May, 2012.

Jon J. Shindurling
DISTRICT JUDGE

State of Idaho)
) ss.
County of Bingham)
I hereby certify that the foregoing instrument is a full, true and correct copy of the original on file in the office of the undersigned Clerk of the District Court of the Seventh Judicial District of Idaho, in and for Bingham County.
Date 5/17/12
SARA J. STAUFER
Clerk of the Court
By _____
Deputy Clerk

APPENDIX B

NO. 01-99008 and 01-99009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD A. LEAVITT, Petitioner/Appellee/Cross-Appellant, vs. A.J. ARAVE, Warden, Idaho State Correctional Institution, Respondent/Appellant/ Cross-Appellee.	)	DISTRICT COURT NO. CV-93-24-S-BLW

PETITIONER/APPELLEE/CROSS-APPELLANT'S BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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death penalty. The trial judge, sitting without a jury, determined which elements, if any, made Leavitt death eligible. At sentencing, the trial judge found only the HAC aggravator present and imposed the death sentence based solely on that element.

As this violates Leavitt's rights under *Ring*, the death sentence must be reversed on this ground.

Defaulted Issues

11. Leavitt's conviction was upheld on appeal on a theory of his guilt which was different from that alleged in the Information.

a. Introduction and Factual Background

This claim involves the Idaho Supreme Court's consideration in *Leavitt I* of the review of the sentence imposed by the trial judge at the first sentencing. The state court's mandatory sentence review decision begins:

> Finally, we turn to the propriety of the imposition of the death sentence. We begin our inquiry by examining I.C. § 18-4003 which prescribes the degrees of murder.

State v. Leavitt, 775 P.2d at 606.

Leavitt's counsel had not addressed the issue of the sufficiency of the evidence at any point in his brief. Nevertheless, the Idaho Supreme Court, *sua sponte*, addressed the sufficiency of the evidence of first degree murder in

determining the propriety of the imposition of the death sentence. The court analyzed the various theories of first degree murder, rejecting all but one -- that of torture murder. In doing so, the court specifically concluded that there was insufficient evidence of murder committed in the commission of a rape and impliedly concluded that there was insufficient evidence of premeditated murder. The court concluded only that "the record is clear that the murder in question was 'perpetrated' with the intent to cause suffering or to satisfy some sadistic inclination." *State v. Leavitt*, 775 P.2d at 606.

At trial, Leavitt was charged only with premeditated murder, and the jury was never instructed regarding a torture murder. (ER 213, 230.) Yet in order to comply with principles of due process, a reviewing court cannot affirm a conviction for a charge which was never made and on which the jury had never been instructed. *Presnell v. Georgia*, 439 U.S. 14 (1978). This obvious error was not addressed in a petition for rehearing by Leavitt's counsel on appeal or raised in the subsequent resentencing where Leavitt continued to be represented by the same counsel.

The district court did not reach the merits of this claim, instead dismissing it on procedural grounds. (ER 365.) In response to this ruling in 1996, Leavitt

asked the court for reconsideration or in the alternative, permission to amend the petition, both of which were denied by the court. (SER 103-4.)

b. The claim was not procedurally defaulted

The district court based its procedural default ruling on the remarkable ground that while the state supreme court has a mandatory duty to review the constitutionality of the trial court's selection of sentence, it has no mandatory duty to "consider[] any possible claims of constitutional error regarding its own decision." (ER 366.) By the district court's reasoning, the state's highest court cannot itself act unconstitutionally, even though it must by statute review the trial court's sentencing, and in this case reviewed the sufficiency of evidence question *sua sponte*.

Thus, the district court held that this claim was not addressed on appeal and therefore was not covered by the state court's language that

> Since the instant case involves a conviction of first degree murder and the imposition of the death penalty, we have carefully reviewed the record for any indication of any prejudicial error occurring at trial, regardless of whether or not error has been specifically asserted by the defendant.

State v. Leavitt, 775 P.2d at 602.

The district court then ruled that Leavitt could not demonstrate cause and prejudice for the failure of state appellate counsel to raise this issue in the petition

for rehearing or before the resentencing.[13] This basis for the court's ruling must be reversed because it is rooted in a misapplication of Idaho's post-conviction statute. See, *Hoffman v. Arave*, 236 F.3d at 531-532. In this case, while Leavitt was represented by new counsel in his first consolidated appeal and post-conviction petition, that new counsel continued to represent Leavitt throughout the remaining state court proceedings, including appeal after re-sentencing. However, that counsel labored under a direct conflict and therefore, never asserted his own ineffectiveness on appeal or at sentencing. In fact, no state post-conviction petition was filed on Leavitt's behalf after appeal and resentencing.

If the state supreme court was under no duty itself to act within the bounds of the federal constitution, appellate counsel's failure to raise this claim on rehearing or on remand constitutes cause for the default.[14] In examining the cause

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[13] In fact, the district court ruled that this issue did not involve the actual imposition of Leavitt's death sentence. (ER 366, n. 5) Yet, it was the improper finding of first degree murder that made Leavitt eligible for death at his re-sentencing. Had the state supreme court acted in a constitutional manner, Leavitt would not have been eligible for death on remand, because there was insufficient evidence of the sole charge he faced – that of premeditated murder.

[14] *Edwards v. v. Carpenter*, 529 U.S. 446 (2000), is not controlling here, because the parties stipulated that Leavitt had exhausted all of his claims in state court. (ER 360, n. 1.) Since the state default rule is not valid, Leavitt can raise the ineffective assistance of counsel claim as cause to excuse the default.

and prejudice question, this Court must acknowledge the cause is external to Leavitt.

Furthermore, the prejudice is great because the claim is obvious on the record and it would have prevented the imposition of the death sentence which was ultimately imposed, as I.C. § 18-4004 states that the maximum punishment for a second degree murder is life in prison.

Because the district court did not properly consider the issue of cause and prejudice to excuse a valid state default, this Court should either address this claim on its merits in the first instance or remand to the district court for further proceedings on the merits of this claim.[15] In either event, Leavitt must prevail on this claim. *Presnell* conclusively controls this issue. It cannot be disputed that Leavitt was charged only with premeditated murder and that the jury was never instructed on a theory of torture murder. Nor can the state claim that the elements of the two types of first degree murder are the same. *State v. Tribe,* 852 P.2d 87 Idaho (1993).

Moreover, the finding of the Idaho Supreme Court in *Leavitt I* is an explicit, or implied, acquittal of the premeditated murder charge. The state court examined

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[15]Because of the procedural default decision, the parties never addressed the merits of this claim in the district court.

the evidence to determine if there was support in the evidence for the existence of a first degree murder charge. Because of the nature of the evidence presented at trial, the state court concluded that there was only sufficient evidence of torture murder, which does not involve an intent to kill. Without sufficient evidence of the precise charge Leavitt faced in the trial court, his conviction must be reversed.

c. The Denial of the Motion to Amend

After the district court's decision on procedural default, Leavitt's alternative motion to amend was denied. While Leavitt contends that no such amendment is required for the court to consider the ineffective assistance of counsel as cause to excuse any default, Leavitt did move to amend in order to make every effort squarely to present this matter to the district court.

Leavitt's First Amended Petition raised a claim of ineffective assistance of trial and appellate counsel.

> 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, *see* Claim 11, below.

(ER 308.)

Respondent answered by "admit[ting] that the issues proffered by Petitioner were not raised on appeal or in the post-conviction proceedings." (ER 350.) The answer did not allege that Leavitt was deficient for failing to allege specific facts to establish this claim or to challenge the allegation as an attempt to consider blanket future claims.

In the traverse, Leavitt, in response to the allegations that certain claims had been defaulted, asserted that "[i]f any such claim was procedurally defaulted there exists cause and prejudice for the default in that Petitioner was denied the effective assistance of counsel at trial and on appeal and each claim is meritorious and requires reversal of the conviction and sentence of death in this matter." (SER 27.)

Each of the claims which Leavitt sought to rely upon for the ineffective assistance of counsel claim is set out in that paragraph, including this claim. The State was made aware from the beginning that Leavitt would base his allegations of ineffective assistance of appellate counsel on the failure to raise those claims identified in the First Amended Petition as meritorious individual claims, and that Leavitt would assert that this was also the cause for any procedural default.

To correct the district court's narrow reading of the petition and traverse and its refusal to consider appellate counsel's error as the basis for cause, Leavitt

filed the motion to amend the ineffective assistance of counsel claim to specifically address this issue. The proposed amendment read, in relevant part, as follows:

> 74. Counsel on appeal and in the post-conviction proceeding failed to provide constitutionally effective assistance of counsel in the following manner:
>
> a) Counsel failed to challenge the Idaho Supreme Court's affirmance of the conviction and sentence on a theory of first-degree murder which was not charged and presented to the jury. Appellate counsel was not aware of the case of *Presnell v. Georgia*, 439 U.S. 14 (1978) and therefore took no action to seek rehearing after the Idaho Supreme Court issued its decision on the direct appeal in 1989. This omission prejudiced Petitioner because it is clear that the sole basis for the Idaho Supreme Court's affirmance of the first degree murder charge as the basis for the imposition of the death penalty was its incorrect finding that the murder was a torture murder.

(SER 184.)

The district court denied the motion because of undue delay. (SER 191-2.) However, the amendment would not have caused undue delay. This single issue would then have been addressed in the motion for summary judgment and decided with the remainder of the claims during the next four years.

The Advisory Committee Notes to Habeas Rule 5 suggest that the district court should permit amendment "when the court feels that this is called for by the

contents of the answer." The Notes refer to Civil Rule 15 which addresses amendment to the pleadings. That rule states in part that "leave shall be freely given when justice so requires." Fed. Rules Civil Procedure, Rule 15(a).

Courts have long permitted amendments to "cure formal, procedural, or substantive defects in the petition and state tenable claims for relief." Liebman, Federal Habeas Corpus Practice and Procedure, Second Edition, p. 479. Moreover, since this is a capital case, liberal leave to amend should be afforded. *See, e.g. Moore v. Balkcom*, 716 F.2d 1511, 1526 (11th Cir. 1983) ["Certainly in a capital case, the district court should be particularly favorably disposed toward a petitioner's motion to amend."] and *Hoffman v. Arave*, CV-94-0200-S-BLW, Order dated September 11, 2001, after remand from this Court, [permitting amendment to appellate ineffective assistance claim].

Leavitt sought leave to amend to correct a "defect" within two weeks of the district court decision in which this "defect" was first raised. The state did not raise this issue in any prior pleading, and did not respond to the Traverse, although provided an opportunity to do so. (SER 195.) Leavitt specifically referred to the basis of these claims in his Reply Brief re Procedural Default filed on August 12, 1996, and the state did not reply. The amendment was thus not untimely and would not have caused any undue delay.

Finally, the district court held the amendment was futile, because the claim fails on the merits. Because "claim 4 alleges that the Idaho Supreme Court erred during appellate review[,] therefore counsel could not have presented this claim on appeal." (SER 192.) The Idaho Rules of Appellate Procedure permit an appellant to seek rehearing of any decision of the appellate court within 21 days of the filing of the opinion. (I.A.R, Rule 42.) Thus, the state appeal is not concluded until the time for filing a petition for rehearing has passed.

Appellate counsel should have raised the clear error contained in the Supreme Court decision within the proper time period. By this failure, Leavitt was denied the effective assistance of appellate counsel and the amendment would not have been futile.

This Court should reverse the imposition of the sentence of death and remand with instructions that Leavitt can only be charged with second degree murder, the greatest charge found by the state appellate court.

12. The district court should have reached Leavitt's claims that his conviction and sentence were the result of ineffective assistance of counsel.

a. The District Court Ruling.

The district court concluded that the claims of ineffective assistance of counsel at trial, sentencing and on appeal were procedurally defaulted under

I.C. § 19-2719. (ER 370-373.)

b. *Hoffman* Requires Remand on these Claims.

After the district court's decision, this Court held in *Hoffman v. Arave,* 236 F.3d at 531-532 that the statute does not provide a remedy for raising ineffective assistance of counsel claims. Should this Court not affirm the grant of habeas relief on other grounds, it must remand for consideration of the ineffective assistance of counsel claims, especially those claims on appeal and at re-sentencing, which were erroneously defaulted by the district court.

APPENDIX C

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

RICHARD A. LEAVITT,

PETITIONER,

- vs -

ARVON J. ARAVE, Warden,

RESPONDENT.

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

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS ERRED WHEN IT HELD, CONTRARY TO THE OPINIONS OF THE SIX OTHER CIRCUITS WHICH HAVE ADDRESSED THIS QUESTION, THAT THIS COURT'S DECISION IN *CAGE V. LOUISIANA*, 398 U.S. 39, 41 (1990), SHOULD NOT BE APPLIED RETROACTIVELY TO CASES WHICH WERE FINAL AT THE TIME *CAGE* WAS DECIDED.

2. WHETHER THE COURT OF APPEALS ERRED WHEN IT HELD THAT A JURY INSTRUCTION WHICH INFORMS A CRIMINAL JURY THAT THE PRESUMPTION OF INNOCENCE AND THE STATE'S BURDEN OF PROOF BEYOND A REASONABLE DOUBT ARE "NOT INTENDED TO AID ANYONE WHO IS IN FACT GUILTY TO ESCAPE," BUT RATHER ARE "HUMANE PROVISION[S] OF THE LAW . . . TO GUARD AGAINST THE DANGER OF AN INNOCENT PERSON BEING UNJUSTLY PUNISHED," DID NOT CONTRAVENE DUE PROCESS PRINCIPLES ESTABLISHED BEFORE *CAGE*, BY THIS COURT'S DECISION IN *IN RE WINSHIP*, 397 U.S. 358 (1970).

3. WHETHER THE COURT OF APPEALS ERRED WHEN IT HELD, CONTRARY TO THE DECISIONS OF SEVERAL OTHER COURTS, THAT A HEARSAY ACCUSATION MADE AGAINST AN ACCUSED BY A WITNESS TO POLICE OFFICERS FOR THE PURPOSE OF HAVING THE ACCUSED APPREHENDED IS NOT "TESTIMONIAL" UNDER THE CONFRONTATION CLAUSE PRINCIPLES OF *CRAWFORD V. WASHINGTON*, BECAUSE THE ACCUSATION WAS NOT MADE DURING POLICE "INTERROGATION" OF THE DECLARANT.

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

RICHARD A. LEAVITT,

PETITIONER,

- vs -

ARVON J. ARAVE,

RESPONDENT.

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.

OPINION BELOW

The 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

A-1. On October 15, 2004, the Court of Appeal denied rehearing. A copy of the order denying rehearing is attached hereto in the Appendix at A-36.

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 (AEDPA) in 1996, and therefore is not controlled by the provisions of that act.

CONSTITUTIONAL PROVISIONS INVOLVED

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 be confronted with the witnesses against him ... .

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

Course of Proceedings

Petitioner Richard A. Leavitt was charged with murder in an Idaho state court, found guilty after a jury trial, and was thereafter sentenced to death by the trial Court, 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 the dismissal of a petition for post conviction relief, but remanded for resentencing, *State v. Leavitt*, 116 Idaho 285, 775 P.2d 599 (1989)(Leavitt I).

A resentencing hearing was held on February 16, 1990, and the trial judge again sentenced Leavitt to death. Leavitt again took a direct appeal to the Idaho Supreme Court, which affirmed the death sentence on November 27, 1991, *State v. Leavitt*, 121 Idaho 4, 822 P.2d 523 (1991) (Leavitt II).

Leavitt then 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 United States District Court for the District of Idaho, the Hon. B. Lynn Winmill presiding, granted the writ on the basis of invalid jury instructions, but denied relief on Leavitt's other issues.

On appeal, the State argued for the first time (in this case which had been pending for some ten years) that the relief granted by the district court constituted a "new rule," application of which to Leavitt was barred by *Teague v. Lane*, 489 U.S. 288 (1989). The Ninth Circuit held that this argument was not waived, that the district court's decision was indeed a "new rule," retroactive application of which was not permitted under either of *Teague's* second exceptions, and reversed the district court's grant of the writ. The Court affirmed the district court's denial of the writ on the other claims. *Leavitt v. Arave*, 383 F. 3d 809, 816-26 (9th Cir. 2004). On October, 15, 2004, Leavitt's Petition for

Rehearing was denied.

Leavitt now timely petitions this Court for issuance of a writ of certiorari.

Statement of Relevant Facts

On or about July 18, 1984, Danette Elg was fatally stabbed in her home. Her body was not discovered for several days and thus the precise date and time of death was impossible to determine. Leavitt knew the victim, and, concerned about her whereabouts, he contacted other friends and inquired after her. On July 21, Leavitt obtained permission from the victim's parents and with the assistance of the local police, entry was made into the house, where her body was discovered by a police officer.

The evidence pointing to Leavitt as the murderer was largely circumstantial in nature. He denied committing the offense and presented an alibi defense. The state presented evidence that in the early morning hours of July 17, the victim had called the police to report a prowler attempting to enter her house. Over objection, the police dispatcher and the officer who went to the scene and interviewed the victim were permitted to testify that the victim thought and "assumed" that the prowler was Leavitt. Leavitt denied that he had been the prowler and the police saw neither him nor his car when they arrived at the house within minutes of the dispatch call.

In the context of this circumstantial evidence case, the jury was given a series of instructions which 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.

R., p. 772 (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." This Court disapproved this instruction in *Victor*, but, in the context of the numerous other supporting instructions in that case, found that it did not require reversal.

Another instruction directed that not all the facts in the case need be proved beyond a reasonable doubt (Preliminary Instruction No. 13), which 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 violation of *Winship*, 397 U.S. at 364. The jury was 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 ...," which is inconsistent with the proposition that a "reasonable doubt" is one which would cause a person to hesitate in the most important of his or her own affairs, which was one of the instructions which the Court in *Victor* relied upon in upholding the Webster instruction.

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).

The Idaho Supreme Court affirmed the conviction, but reversed the sentence of death, finding Leavitt to be "atypical of any [defendant] that [the] Court has viewed in the context of the death penalty." *State v. Leavitt,* 116 Idaho 285, 293 (1989). The sentencing 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." *Ibid.* Reversing the sentence of death, the Idaho Supreme Court directed the trial court to consider alternatives to the death penalty, especially long term incarceration.

After remand, the trial judge found one aggravating circumstance, and again sentenced Leavitt to death. Upon a second review, the Idaho Supreme Court affirmed the imposition of the death sentence.

REASONS FOR GRANTING THE WRIT

I.
CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE COURT BELOW AND THE DECISIONS OF SIX OTHER CIRCUITS THAT HAVE HELD THAT THE *CAGE* RULE IS A "WATERSHED RULE OF CRIMINAL PROCEDURE" WHICH "IMPLICATE[S] THE FUNDAMENTAL FAIRNESS OF THE TRIAL," AND IS THUS WITHIN THE SECOND EXCEPTION TO *TEAGUE* NON-RETROACTIVITY.

While it is now clear that this Court gives "retroactive effect to only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and

accuracy of the criminal proceeding," *Schriro v. Summerlin*, ___ U.S. ___, 124 S.Ct. 2519, 2523 (2004), quoting *Saffle*, 494 U.S. at 495, quoting *Teague*, 489 U.S. at 311, this Court has never resolved the question whether its decision in *Cage v. Louisiana*, 398 U.S. 39, 41 (1990) should be applied retroactively. All the circuit courts of appeal to reach this issue, except the Ninth in this case, have held that *Cage* error meets the requirements for retroactivity. This Court should grant certiorari to resolve this conflict among the circuits.

In order to qualify for the second exception to non-retroactivity in *Teague*, a rule must meet two requirements:

> [First] [i]nfringement of the rule must "seriously diminish the likelihood of obtaining an accurate conviction," and [second] the rule must " ' "alter our understanding of the bedrock procedural elements" ' essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (quoting *Teague, supra*, at 311) (plurality opinion), in turn quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).

Tyler v. Cain, 533 U.S. 656, 665 (2001).

In its opinion below, the Ninth Circuit panel conceded that *Cage* meets the first of these two requirements, since it seriously diminishes the likelihood of obtaining an accurate conviction:

> [i]t is clear that the first "watershed" requirement is met because a defective reasonable doubt instruction affects the accuracy of the finding of guilt beyond a reasonable doubt. Indeed, it destroys it. Misdescribing the burden of proof "vitiates all the jury's findings," has "consequences that are necessarily unquantifiable and indeterminate," and transforms appellate review into "pure speculation." *Sullivan* [*v. Louisiana*, 508 U.S. 275 (1993)] at 281-82 , 113 S.Ct. 2078. In short, when a Cage error is committed, "a criminal trial cannot reliably serve its function." Id. at 281,

> 113 S.Ct. 2078. From this it necessarily follows that a defective reasonable doubt instruction seriously decreases the likelihood of obtaining an accurate conviction.

383 F. 3d at 825. This has been the clear understanding of the law for over one hundred years:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence -- that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."

In re Winship, 397 U.S. 358, 363 (1970), quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895); *Tyler*, 533 U.S. at 673 (BREYER, J., dissenting) ("our language in *Sullivan* could not have made clearer that *Cage* error seriously undermines the accuracy and reliability of a guilty verdict.") This in itself differentiates *Cage* from all thirteen of the "new rule" retroactivity cases decided after *Teague*[1], for most of the rules previously

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[1] *Schriro v. Summerlin*, ___ U.S. ___, 124 S. Ct. 2519 (2004) (Rule of *Ring v. Arizona*, 536 U.S. 584 (2002) that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) requires that aggravating circumstances in a capital case be found by a jury beyond a reasonable doubt); *Beard v. Banks*, ___ U.S. ___, 124 S. Ct. 2584 (2004) (Rule of *Mills v. Maryland*, 486 U.S. 367 (1988) and *McKoy v. North Carolina*, 494 U.S. 433 (1990), holding invalid capital sentencing schemes which require juries to disregard mitigating factors not found unanimously); *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (Rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994), that a capital defendant must be permitted to inform his sentencing jury that he is parole-ineligible if the prosecution argues that he is a future danger); *Lambrix v. Singletary*, 520 U.S. 518, 539-40 (1997) (Rule of *Espinosa v. Florida*, 505 U.S. 1079 (1992), that in certain states where a sentencing judge is required to give deference to a jury's advisory sentencing recommendation with respect to the death penalty, neither the jury nor the judge is permitted to consider invalid aggravating circumstances); *Gray v. Netherland*, 518 U.S. 152, 170 (1996) (Rule that the state's

analyzed for retroactivity (*e.g., Schriro, Goeke, Graham*, and *Sawyer*) have been found not to implicate accuracy to any significant degree, and several (*e.g., Caspari, Saffle, Butler*) have been found actually to *diminish* accuracy.

The panel concludes, however, that *Cage* does not satisfy the second requirement. It acknowledges that the six Circuits which had previously addressed this question had decided that *Cage* should be applied retroactively. *See Tillman v. Cook*, 215 F.3d 1116, 1121-22 (10th Cir.2000); *West v. Vaughn*, 204 F.3d 53, 55, 61 (3d Cir.2000); *Gaines v.*

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failure to give adequate notice of some of the evidence it intended to use in the petitioner's capital sentence proceeding violates due process); *Goeke v. Branch*, 514 U.S. 115, 120-21 (1995) (per curiam) (Rule that due process generally prohibits a state appellate court from dismissing the appeal of a recaptured fugitive); *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994) (Rule that twice subjecting a defendant to a noncapital sentence enhancement proceeding violates the Double Jeopardy Clause); *Gilmore v. Taylor*, 508 U.S. 333, 345-46 (1993) (Rule of *Falconer v. Lane*, 905 F.2d 1129 (7th Cir.1990), that the failure to instruct a jury that it could not return a murder conviction if it found that the defendant possessed a mitigating mental state violates due process); *Graham v. Collins*, 506 U.S. 461, 478 (1993) (Proposed rule that jury instructions preventing a petitioner's sentencing jury from considering mitigating evidence of youth, family background, and positive character traits in a capital sentencing proceeding violates Eighth and Fourteenth Amendments); *Sawyer v. Smith*, 497 U.S. 227, 241-45 (1990) (Rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that the Eighth Amendment prohibits the imposition of a death sentence by a jury that has been led to the false belief that responsibility for determining the appropriateness of the capital sentence lies elsewhere); *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (Proposed rule that the trial court's instruction in the petitioner's capital sentence proceeding, telling the jury to "avoid any influence of sympathy," violates the Eighth Amendment); *Butler v. McKellar*, 494 U.S. 407, 416 (1990) (Rule of *Arizona v. Roberson*, 486 U.S. 675 (1988), that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation); *Teague v. Lane*, 489 U.S. 288 (1989) (Rule of *Taylor v. Louisiana*, 419 U.S. 522 (1975), that the Sixth Amendment's fair cross-section requirement applies to a petit jury).

Kelly, 202 F.3d 598, 604-605 (2d Cir.2000); *Humphrey v. Cain*, 138 F.3d 552, 553 (5th Cir.1998) (en banc); *Adams v. Aiken*, 41 F.3d 175, 178-79 (4th Cir.1994); *Nutter v. White*, 39 F.3d 1154, 1157 n. 5, 1158 (11th Cir.1994). It seeks to distinguish these opinions, however, and creates a conflict among the Circuits, on the ground that each was decided before this Court's decision in *Tyler v. Cain*, 533 U.S. 656 (2001). *Leavitt*, 383 F.3d at 825. In doing so, it reads more into *Tyler* than can fairly be said to be there, and it never actually conducts its own independent retroactivity analysis.

In *Tyler* this Court considered a successive habeas petition under 28 U.S.C. § 2244(b)(2)(A), which could only be maintained if it relied "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* As in the present case, there was a conflict in the Circuits -- specifically on the question whether this Court had "made" *Cage* retroactive. *Tyler*, 533 U.S. at 661.

This Court reversed, ruling that "made"was synonymous with "held," and that none of its cases had "held" *Cage* to be retroactive. It rejected the suggestion that the holding of *Sullivan* that *Cage* error is "structural" in itself also made *Cage* retroactive for *Teague* purposes. This was because the Court had not held

> that all structural-error rules apply retroactively or that all structural-error rules fit within the second *Teague* exception. The standard for determining whether an error is structural, see generally *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), is not coextensive with the second *Teague* exception, and a holding that a particular error is structural does not logically dictate the conclusion that the second Teague exception

has been met.

533 U.S. 666-67.[2] The panel below seized upon this point to distinguish the previous six opinions of other Circuits. In this, it appears to assume that these cases had not independently analyzed the *Cage* rule, but rather had assumed, in rote fashion, that because *Sullivan* had attached the "structural" label to *Cage* error, it therefore necessarily followed that *Cage* announced a "watershed" rule.

Perhaps for this reason, the panel does not go on to conduct its own substantive analysis of the question whether *Cage* "alter[s] our understanding of the bedrock procedural elements that are essential to the fairness of a criminal trial." *Teague*, 489 U.S. 311. Instead it simply points to *Tyler's* reiteration that "it is unlikely that any of these watershed rules 'ha[s] yet to emerge,'" *Tyler*, 533 U.S. at 666, n.7, quoting *Sawyer*, 497 U.S. at 243, (quoting *Teague*, 489 U.S. at 313 (plurality opinion)), and *Graham*, 506 U.S. at 478. It also notes that offered eleven opportunities to find rulings to be "watershed," this Court has never actually done so. As a result, "[i]t follows that it is 'unlikely' that *Cage* is a watershed rule," *Leavitt*, 383 F.3d at 809.

We do not dispute that *Tyler* held that "structural" is not in and of itself

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[2] The Court also declined the invitation to use Tyler's case itself as the vehicle to make *Cage* retroactive. It did so because 28 U.S.C. §2244(b)(2)(A) required that that decision have been made in a *previous* case. If the Court made that ruling in the present case, it reasoned, it would not be of immediate benefit to Tyler (who would be required to file a new successive petition in order to raise it), and thus would be dictum, and therefore not constitute a holding of the Court. 533 U.S. at 667-8. As a result the question whether *Cage* is to be applied retroactively remains undecided by this Court.

"watershed." But *Tyler* does *not* decide that the rule of *Cage/Sullivan* is *not* to be applied retroactively -- on the contrary, it explicitly refrains from deciding that question. *Tyler*, 533 U.S. at 667-8. What's more, even though the "structural" designation does not in and of itself make a rule "watershed," this is at least an important consideration, because obviously "[t]he *Tyler* majority did not ... reject the much narrower proposition that a 'structural error' classification is, at the very least, highly relevant to the determination whether a new rule qualifies for Teague's second exception." 2 Liebman, Federal Habeas Corpus Practice and Procedure, § 25.7, n. 37, p. 1127 (2004). For example, the rule of *Gideon*, which the Court has repeatedly referred to as one which would satisfy the second *Teague* exception, has also, like *Cage*, been held to constitute "structural" error. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619, 629-630 (1993) (describing *Gideon* as an example of "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," requiring "automatic reversal of the conviction because they infect the entire trial process," quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)).

Nor did the six Circuits which *have* applied *Cage* retroactively simply assume, without further analysis, that because the unanimous Court in *Sullivan* determined that *Cage* error is "structural," it necessarily followed that the rule constituted a "watershed." On the contrary, each conducted an independent analysis of the principles which underlie the *Teague* formulation, and concluded that *Cage* met the test.

However other "structural" errors might be analyzed under *Teague*, *Cage* error plainly constitutes a "watershed." This is the type of error to which this Court referred in *Rose v. Clark*, when it said that "[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence," *Rose v. Clark,* 478 U.S. 570, 577-578 (1986); *Sullivan*, 508 U.S. at 281. Surely such an error bears on a "bedrock" procedural element.[3] Under pre-*Teague* retroactivity analysis, which encompassed concepts very similar to those contained in the second *Teague* exception, *Winship* itself was held to be fully retroactive, *see Ivan v. City of New York*, 407 U.S. 203 (1972) (*Winship* fully retroactive because rule contributes to accuracy of truth-determining function); *see also Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977) (rule of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), forbidding State to place burden of persuasion on defendant is fully retroactive because rule contributes to reliability of convictions).

Justice Scalia's description of the role of the requirement for proof beyond a reasonable doubt in *Sullivan* (as distinct from the mere attachment of the label "structural") certainly supports this conclusion. "Denial of the right to a jury verdict of

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[3] *Cf.*, *Schriro*, in which the majority remarked that "[t]he right to jury trial is fundamental to our system of criminal procedure... ." ___U.S. at ___, 124 S. Ct. at 2526, as a result of which the dissent noted that "[t]he majority does not deny that *Ring* meets the first criterion, that its holding is 'implicit in the concept of ordered liberty.'" ___U.S. at ___, 124 S.Ct. at 2527 (Breyer, J., dissenting).

guilt beyond a reasonable doubt [is "structural"], the jury guarantee being a 'basic protectio[n]' whose precise effects are unmeasurable, but *without which a criminal trial cannot reliably serve its function*," *Sullivan*, 508 U.S. at 281, quoting *Rose*, 478 U.S. at 577 (emphasis added). In the *Cage* situation, quite simply, "there has been no jury verdict within the meaning of the Sixth Amendment," *Sullivan*, 508 U.S. at 280. This "misdescription of the burden of proof ... vitiates *all* the jury's findings," *id.*, 580 U.S. at 281 (emphasis in original). In short, unlike the many narrow procedural issues which this Court has declined to characterize as "watershed," in the fifteen years since *Teague* was decided, the rule in *Cage* has all of "the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception." *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

Likewise, the dissenters in *Tyler* reasoned that *Cage* implicates a fundamental aspect of criminal procedure -- not simply because *Sullivan* attached the label "structural," but also

> because an instruction that makes "all the jury's findings" untrustworthy, *Sullivan, supra*, at 281, 113 S.Ct. 2078, must "diminish the likelihood of obtaining an accurate conviction," *Teague*, supra, at 315, 109 S.Ct. 1060 (plurality opinion). It is because a deprivation of a "basic protection" needed for a trial to "serve its function," *Sullivan*, supra, at 281, 113 S.Ct. 2078 (internal quotation marks omitted), is a deprivation of a "bedrock procedural elemen[t]," *Teague*, supra, at 311, 109 S.Ct. 1060 (plurality opinion) (internal quotation marks omitted). And it is because *Cage* significantly "alter[ed]" pre-existing law. 489 U.S., at 311, 109 S.Ct. 1060. That is what every Court of Appeals to have considered the matter has concluded.

Tyler, 533 U.S. at 672. , 533 U.S. at 671 (Breyer, J., dissenting). These arguments are simply never addressed by the panel below.

Every circuit (but one) to reach the question whether *Cage* should be applied retroactively has decided that it should be. And *every* circuit to have reached the question and made a principled analysis of it on its merits has decided that it should be. The Court should issue its writ of certiorari to resolve this Circuit conflict, and should now rule that *Cage* must be applied retroactively.

II.
CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE COURT BELOW CORRECTLY HELD THAT ALL CHALLENGES TO INSTRUCTIONS WEAKENING THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT ARE GOVERNED BY *CAGE*

Instruction No. 12 was "self-defeating," *Reynolds v. United States*, 238 F.2d 460, 463 (9th Cir. 1956), because it provided that the presumption of innocence and the requirement for proof beyond a reasonable doubt simply do not apply to a person who is guilty "in fact." Thus, while it is true that other instructions stated that reasonable doubt *must* be found as a precondition to guilt (instructions 24, 25, 28, 32, and 33), and that the decision to convict *must* be based on the evidence presented at trial (instructions 6, 15 and 7), these are undone by Instruction No. 12, which says that the presumption of innocence and the requirement for proof beyond a reasonable doubt simply do not apply except in the case of "an innocent person." Thus the effect of Instruction No. 12 is that it utterly defeats the other instructions which directed the jury to apply the presumption of

innocence and the requirement for proof beyond a reasonable doubt. It also denies Leavitt the benefit of the holding of *In re Winship*, that criminal cases be proved by that standard.

Such a holding would not require the application of a "new" rule. A ruling is "new," for *Teague* purposes, if it "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S., at 301.

> While there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision, "it is more difficult ... to determine whether we announce a new rule when a decision extends the reasoning of our prior cases." *Saffle v. Parks*, 494 U.S. at 488 Because the leading purpose of federal habeas review is to "ensur[e] that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of th[ose] proceedings," *ibid.*, we have held that "[t]he 'new rule' principle ... validates reasonable, good faith interpretations of existing precedents made by state courts." *Butler v. McKellar*, 494 U.S. at 414. This principle adheres even if those good-faith interpretations "are shown to be contrary to later decisions." *Ibid.* Thus, unless reasonable jurists hearing petitioner's claim at the time his conviction became final "would have felt compelled by existing precedent" to rule in his favor, we are barred from doing so now. *Saffle v. Parks, supra*, 494 U.S. at 488.

Graham v. Collins, 506 U.S. 461, 467 (1993).

The requirement for proof beyond a reasonable doubt was established long before Leavitt's case became final. "It has been settled throughout our history that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *United States v. Booker*, 2005 WL 50108, *6 (January 12, 2005), quoting

Winship, 397 U.S. at 364. Instruction No. 12 had the effect of directing the jury to consider instead whether Leavitt was guilty "in fact." It was thus a direct violation of *Winship*, and, in the language of *Teague*, reversal is "compelled" and "dictated" by *Winship*.

The cases which the panel cites for the proposition that the law was not clear on this point, *see* 383 F.3d 819-21, all either involved cases decided before *Winship*, instructions which were less egregious than Instruction No. 12, and one which was decided under AEDPA.[4]

For these reasons, the Court should issue its Writ of Certiorari to the Ninth Circuit, and overrule on this point.

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[4] Cases finding an instruction similar to no. 12 invalid: *United States v. Doyle*, 130 F.3d 523, 539 (2d Cir.1997); *Reynolds v. United States*, 238 F.2d 460, 463 (9th Cir.1956); *United States v. Bridges*, 499 F.2d 179, 186 (7th Cir.1974); *Shaw v. United States*, 244 F.2d 930 (9th Cir.1957); *Gomila v. United States*, 146 F.2d 372, 373 (5th Cir.1944); *Sipress v. State*, 562 N.E.2d 758, 762 (Ind.Ct.App.1990); *Gilleylen v. State*, 255 So.2d 661, 664 (Miss.1971). Cases approving a similar instruction but decided before *Winship*: *United States v. Farina*, 184 F.2d 18, 20-21 (2d Cir.1950); *Moffitt v. United States*, 154 F.2d 402, 404-05 (10th Cir. 1946); *State v. Farnsworth*, 51 Idaho 768, 10 P.2d 295, 299 (1932); *State v. Gilbert*, 8 Idaho 346, 69 P. 62, 64 (1902). Cases approving an instruction less egregious than no. 12: *State v. Schiappa*, 248 Conn.132, 728 A.2d 466, 486 (1999); *United States v. Ciak*, 102 F.3d 38, 45- 46 (2d Cir.1996); *Heald v. State*, 492 N.E.2d 671 (Ind.1986). Post-ADEPA case: *DelValle v. Armstrong*, 306 F.3d 1197, 1200 (2d Cir.2002).

III.
CERTIORARI SHOULD BE GRANTED TO CLARIFY THE DEFINITION OF "TESTIMONIAL" HEARSAY WHOSE ADMISSION IS PRECLUDED BY THE SIXTH AMENDMENT HOLDING OF *CRAWFORD V. WASHINGTON.*

At trial, statements made by the victim to police during their investigation of a possible prowler at her home shortly before her death -- during which she accused petitioner of being the prowler -- were admitted over objection.

Ms. Elg had made a late night call to police dispatch to report that she thought someone was trying to break in through her back door. She said that she heard some noise in her back yard, and thought that someone had jumped over the back fence. She told dispatch that she thought the person was Rick Leavitt. When the dispatcher asked her why, she replied "because he had been there earlier in the day." (T. 796-797.)

A police officer was dispatched to Elg's house. The officer interviewed Ms. Elg and was told that someone had tried to enter her house. Ms. Elg told the officer that "she assumed that it had been Rick Leavitt." (T. 825.) The officer continued to question her about how she knew Leavitt and why she assumed he was the prowler. Ms. Elg stated that Leavitt had come over to her house earlier that evening, and had requested to come into the residence to use the phone, as the cops, the police department was after him." (T. 814.) Ms. Elg told the officer that she would not let Leavitt in the house at the time and that he left the area. Elg "believed that he had returned at the time" the officers were dispatched to her house. (T. 814.)

The trial court upheld the admission of the statements naming Leavitt as the

suspected prowler under Idaho's residual hearsay rule finding a guaranty of trustworthiness when "you make a report to an officer soon after something allegedly happens, [you] know that that's going to be written down." (T. 422-423.)

The federal district court held that the statement was properly admitted under a different hearsay exception, as an excited utterance, and therefore was admissible despite the lack of confrontation based upon *Ohio v. Roberts*, 488 U.S. 56 (1980). Petitioner appealed that ruling to the Ninth Circuit, arguing that the statements violated the Confrontation Clause as they did not fall within a firmly rooted exception to the hearsay rule. The statements naming Leavitt as the suspected prowler were not spontaneous statements but rather were based upon the reflective thoughts of the declarant.

The Court of Appeal held there was no Sixth Amendment Confrontation error despite this Court's recent ruling in *Crawford v. Washington*, 541 U.S.36 (2004) solely because the statement was not "testimonial" nature.[5] It did so although the context in which the statements were made and admitted was remarkably similar to that in Crawford: the jury was permitted to hear, through police testimony, that the declarant was speaking to the police, telling them that she suspected the defendant of a crime. The Ninth Circuit held that did not matter because her statements were not made to the police during "interrogation."

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[5]The Court of Appeal reserved the issue of whether *Crawford* should be retroactively applied to habeas cases.

This conflation of the Fifth and Sixth amendment concepts evidences the confusion the court anticipated in *Crawford*. Although in *Crawford* this Court observed that it has long been the law that testimonial hearsay includes "[s]tatements taken by police officers in the course of interrogations," *Crawford*, 124 S.Ct. at 1364, this Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 1374.

Both the majority and concurring opinions in *Crawford* understood that the failure to define this term would "cause interim uncertainty." *Id.* at 1374, n. 10. Chief Justice Rehnquist wrote that

> the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what . . . is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

Crawford, 124 S.Ct. at 1378, Rehnquist, C.J., concurring.

That there has been uncertainty in the federal and state courts is probably an understatement. Numerous courts throughout the country have been faced with attempting to provide a definition of "testimonial," and to estimate how this Court might decide this question. On the very issue presented by the facts in this case, there is a vast difference of opinion on whether statements given to police by victims, even those that might be considered excited utterances, should be considered testimonial in nature.

For example, while the instant panel determined that the statements were not

testimonial, in another case before the Ninth Circuit, the government conceded that statements made in response to a police officer's questions by a witness who was at the scene during the course of the execution of a search warrant were. *United States v. Nielsen*, 371 F.3d 574 (9th Cir. 2004).

Numerous courts have held on facts very similar to those in this case that the statements were testimonial. *See, e.g., Bell v. State,* 597 S.E.2d 350, (Ga. 2004) (alleged victim's statement to police officers "during the officers' investigations of complaints made by the victim" testimonial); *Moody v. State*, 594 S.E.2d 350 (Ga. 2004) (victim's statement to investigating officer "at the scene" "shortly after" event testimonial); *Lopez v. State*, ___ So.2d ___, 2004 WL 26000408 (Fla. App, November 17, 2004) ("[a] startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect. In this situation, the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made."); *Heard v. Commonwealth,* 2004 WL 1367163 (Ky. App. June 18, 2004) (unpublished) (agitated victim's statements to responding police officer were testimonial even though they qualified as excited utterances). *See also* Michael H. Graham, The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness, 56 Tex. L. Rev. 151, 194-95 (1978) (distinguishing non-testimonial spontaneous declaration to robber in midst of robbery from a testimonial spontaneous declaration to a police officer immediately after robbery).

As the Court ruled in *Crawford*, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 124 S. Ct. at 1364. Here, the trial court admitted the statement solely because it found the witness knew that she was making a report to the police for the very purpose of presenting testimony against the person she thought was responsible for a crime. Thirty six years ago the Court observed that "an out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused." *Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring).

Other courts have reached a contrary result, as the Ninth Circuit did in this case. See, *Fowler v. State,* 809 N.E.2d 960 (Ind. Ct. App 2004) ("when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not 'testimonial,'"), transfer granted *(Fowler v. State*, Ind. Dec. 9, 2004); *Cassidy v. State*, 149 S.W.3d 712 (Tex. App. 2004) (alleged victim's statement to police right after event not testimonial); *Wilson v. State*, ___ S.W.3d ___, 2004 WL 2484835 (Tex. App. Nov. 4, 2004) (statement to responding officer not testimonial); *People v. Newland,* 6 A.D. 3d 330, 331 (N.Y. App. Div. 2004) ("We conclude that a brief, informal remark to an officer conducting a field investigation, not made in response to 'structured police questioning' [citation omitted] should not be considered testimonial"), leave to appeal denied, 3 N.Y.3d 679 (2004); *United States v.*

Webb, 2004 WL 2726100 (D.C. Super. Dec. 22, 2004) (victim's statements to responding officer's questions "what happened?" and "why" were not testimonial because they were not the result of an "interrogation"; "it is exceedingly unlikely that the Supreme Court intended to exclude from evidence excited utterances made during *investigatory questioning* at the scene of a crime soon after the criminal event") (emphasis in original).

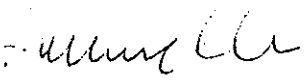
There can be no dispute that the question left unresolved in *Crawford* has split the courts throughout the country. This case presents a straightforward fact pattern that is often repeated in these other cases and is thus an excellent vehicle for this Court to provide a "comprehensive definition of 'testimonial'." We respectfully suggest the Court should issue the writ to resolve this question.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DATED this 13th day of January, 2005.

NEVIN, BENJAMIN & MCKAY LLP



David Z. Nevin

APPENDIX D

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD A. LEAVITT,

Petitioner,

v.

ARVON J. ARAVE, Warden,

Respondent.

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.

WHEN A STATE HIGH COURT AFFIRMS A DEFENDANT'S CONVICTION BUT REVERSES HIS SENTENCE, IS 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 THE DATE ON WHICH THIS COURT DENIES CERTIORARI FROM THE SUBSEQUENT STATE COURT OPINION AFFIRMING THE NEW SENTENCE?

II.

WHETHER CHALLENGES TO INSTRUCTIONS, WHICH WEAKEN THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT AND THE PRESUMPTION OF INNOCENCE, ARE DICTATED BY *IN RE WINSHIP*, SUCH THAT *CAGE V. LOUISIANA* DID NOT CREATE A NEW RULE OF CONSTITUTIONAL LAW

III.

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

IV.

WHETHER, IN ASSESSING DEFICIENT PERFORMANCE AND PREJUDICE UNDER *STRICKLAND*, A COURT MUST APPLY AN OBJECTIVE STANDARD RATHER THAN EXAMINING ONLY THE ACTUAL SENTENCING JUDGE'S INDIVIDUAL PREDILECTIONS

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IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD A. LEAVITT,

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v.

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Respondent.

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 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. 1. The District Court decision rendered in 2007 is attached hereto in the Appendix at App. 22. 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. 71. The District Court decision rendered in 2000 is attached hereto in the Appendix at App. 109. On September 13, 2011, the Court of Appeals denied rehearing. A copy of the order denying rehearing is attached hereto in the Appendix at App. 135. The time for filing this Petition was extended to February 10, 2012.

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 the present 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. 109.

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 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. 22. 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. App. 135.

Leavitt now timely petitions this Court for issuance of a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.
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.

App. 120 (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). App. 115.

Another instruction directed that not all the facts in the case need be proved beyond a reasonable doubt (Preliminary Instruction No. 13), which 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 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. 115. 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. 122. This in turn created a "reasonable likelihood that the jury convicted the petitioner upon less than proof beyond a reasonable doubt." App. 123.

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 a second 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 first 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 (emphasis added). 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," affirming his conviction. *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 (emphasis on "the most recent" 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).

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*.

II.
CHALLENGES TO INSTRUCTIONS WHICH WEAKEN THE REQUIREMENT FOR PROOF BEYOND A REASONABLE DOUBT AND THE PRESUMPTION OF INNOCENCE ARE DICTATED BY *IN RE WINSHIP*, SUCH THAT *CAGE V. LOUISIANA* DOES NOT CREATE A NEW RULE OF CONSTITUTIONAL LAW.

Instruction 12 was "self-defeating," *Reynolds v. United States*, 238 F.2d 460, 463 (9th Cir. 1956), because it provided that the presumption of innocence and the requirement for proof beyond a reasonable doubt simply do not apply to a person who is guilty "in fact." Thus, while it is true that other instructions stated that reasonable doubt must be found as a precondition to guilt (instructions 24, 25, 28, 32 and 33), and that the decision to convict must be based on the evidence presented at trial (instructions 6, 15 and 7), these were undone by Instruction 12, which stated that the presumption of innocence and the requirement for proof beyond a reasonable doubt simply do not apply except in the case of "an innocent person." Thus the effect of Instruction No. 12 is that it utterly defeated the other instructions which directed the jury to apply the presumption of innocence and the requirement for proof beyond a reasonable doubt. It also denied Leavitt the benefit of the holding of *In re Winship*, that criminal cases be proved by that standard.

Such a holding would not require the application of a "new" rule. A ruling is "new," for *Teague* purposes, if it "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301.

> While there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision, "it is more difficult ... to determine whether we announce a new rule when a decision extends the reasoning of our prior cases." *Saffle v. Parks*, 494 U.S. at 488. Because the leading purpose of federal habeas review is to "ensur[e] that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of th[ose] proceedings," *ibid.*, we have held that "[t]he 'new rule' principle ... validates reasonable, good faith interpretations of existing precedents made by state courts." *Butler v. McKellar*, 494 U.S. at 414. This principle adheres even if those good-faith interpretations "are shown to be contrary to later decisions." *Ibid.* Thus, unless reasonable jurists hearing petitioner's claim at the time his conviction became final "would have felt compelled by existing precedent" to rule in his favor, we are barred from doing so now. *Saffle v. Parks, supra*, 494 U.S. at 488.

Graham v. Collins, 506 U.S. 461, 467 (1993).

The requirement for proof beyond a reasonable doubt was established long before Leavitt's case became final. "It has been settled throughout our history that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *United States v. Booker*, 543 U.S. 220, 230 (2005), quoting *Winship*, 397 U.S. at 364. Instruction No. 12 had the effect of directing the jury to consider instead whether Leavitt was guilty "in fact." It was thus a direct violation of *Winship*, and, in the language of *Teague*, reversal is "compelled" and "dictated" by *Winship*.

For these reasons, the Court should grant Certiorari, vacate the decision and remand for consideration of the claim on its merits.

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." App. 26. 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. App. 30. 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. App. 32. *Ake v. Oklahoma*, 470 U.S. 68 (1985). 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. 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." App. 44-45. 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. 42.

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.

IV.
IN ASSESSING DEFICIENT PERFORMANCE AND PREJUDICE UNDER *STRICKLAND*, A COURT MUST APPLY AN OBJECTIVE STANDARD, RATHER THAN EXAMINING ONLY THE ACTUAL SENTENCING JUDGE'S INDIVIDUAL PREDILECTIONS.

The panel majority concluded that "Parmenter made a thorough investigation in preparation for the sentencing hearing," and that the case as a result is not one of those in which counsel "failed to investigate entire areas of mitigation." *Leavitt*, 646 F.3d at 608-9. But Judge Winmill made a factual finding, unchallenged on appeal, that Parmenter

> did not file any motions seeking funds for the assistance of an investigator, a new mental health expert or the completion of the MRI ... counsel did not consult informally with a psychologist, psychiatrist, or other mental health professional to discuss the feasibility of additional inquiry. He apparently did not consult the matter with other criminal defense attorneys who had expertise in capital litigation.

App. 32. In other words, Parmenter interviewed some family members and guards, but he did in fact ignore one crucial "entire area[]" of mitigation: mental health. Judge Winmill concluded "[a] defense attorney's willful blindness to damaging evidence in a capital case cannot be characterized as a type of strategic decision; to the contrary, it is really the absence of strategy." App. 56.

As Judge Winmill concluded,

> [f]ar from wasting limited defense resources and the court's good will 'looking for a needle in a haystack, when a lawyer truly has no reason to doubt there is a needle there,' *see Rompilla*, 547 U.S. at 389, a defense attorney acting reasonably under the circumstances of this case would have known precisely where the needle can be found.

App. 58.

In regard to the prejudice prong, the Ninth Circuit opinion incorrectly based its prejudice analysis on its subjective belief that "it is unlikely that Judge George [the Idaho sentencing judge] would have granted the motion for additional testing, or that the results of any such testing would have changed the outcome of the sentencing." *Leavitt*, 646 F.3d at 613. Throughout its analysis the majority focused on Judge George rather than considering the effect of the new material on an objectively reasonable sentencer as required by *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny.

A. The improper subjective analysis of deficient performance requires review by this court.

The Ninth Circuit panel's majority opinion held that foregoing even an *inquiry* into mental health issues was valid because the sentencing judge had, four years previous, rejected mental health evidence at the first sentencing and therefore might be irritated by further motions for funding.

An attorney's impression of the *possible* rulings of a particular judge – as opposed to those of an objectively reasonable sentencer – has never sufficed as a ground for abandoning valid areas of mitigation. If, as the majority holds, this is enough to comport with due process and the right to counsel, then the Fifth, Sixth, and Fourteenth amendments mean little. Under this reasoning a lawyer could decide not to investigate or present mitigation evidence at all, because of an impression, for example, that the judge "isn't interested in mitigation." No opinion has ever gone so far in consigning the

deficient performance analysis to the subjective whims of a lawyer.

Moreover, the majority's focus on Judge George's prior decision ignores Idaho law which mandates an automatic review of every death sentence, even if the defendant chooses not to appeal. *State v. Wells*, 864 P.2d 1123, n.1 (Idaho 1993); I.C. § 19-2827(c) (prior to 1994 amendment) (Idaho Supreme Court reviews capital sentences for excessiveness, dis-proportionality, or influence of passion, prejudice, or arbitrary factors). In other words, Parmenter was not constructing a mitigation case for the consideration of Judge George alone. Even assuming Judge George would ignore mental health evidence, there was no reason to suppose that the five judges on the Idaho Supreme Court would do so.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691. The focus must be on whether the investigation supporting a particular decision was itself reasonable. *Wiggins v. Smith,* 539 US 510, 523 (2003). And a decision *not* to investigate must be examined in light of all circumstances, not just counsel's belief about a particular judge's predilections. Thus, the decision to abandon investigation based solely on a prior ruling by the judge, a ruling which Parmenter believed was erroneous, does not comport with the requirements of the Sixth Amendment. Parmenter's decision was made in the absence of investigation, rather than upon the conduct of a reasonable investigation as required by *Wiggins*.

Moreover, the opinion's reliance on Parmenter's possible reasoning for the lack of

investigation runs counter to the requirement that reviewing courts not engage in "post hoc rationalization of counsel's conduct" rather than a proper analysis of counsel's "deliberations prior to sentencing." *Wiggins v. Smith*, 539 U.S. at 526-527.

The opinion excuses Parmenter's decision to abandon even an *inquiry* into mental health evidence on the theory that he was afraid that he would irritate the sentencing judge. But there is no support for such a conclusion in this case.

Leavitt and his mother had both asked Parmenter to pursue mental health issues, and when it became apparent that he would not do so, Leavitt took matters into his own hands. In open court, while counsel sat watching, Leavitt rose and made his own request to the sentencing judge to order a new psychological evaluation. The judge acknowledged the request, and affirmed that he wanted to provide Leavitt with "all his rights," but never ruled on the motion. At this juncture, Parmenter surely had nothing to lose by making an unequivocal *Ake* demand for an MRI. App. 58.

B. The prejudice inquiry should not turn on the changing and largely unknowable inclinations of a particular judge, but rather on whether there is a reasonable probability of a different result before an objective sentencer.

The Ninth Circuit's deference to the subjective predilections of the sentencing judge creates a circuit split undermining the well established law of this Court. Since the *Strickland* decision in 1984, the proper assessment of prejudice is based on an objective standard that presumes a reasonable decisionmaker. *Strickland*, at 695.[1] *Accord*,

[1] In *Strickland*, the sentencing judge testified at the evidentiary hearing that the new mitigating evidence would not have affected his decision. This Court found this

Sumerlin v. Schriro, 427 F.3d 623, 643 (9th Cir. 2005) (using phrase "objective sentencing factfinder"). *See also Williams v. Allen*, 542 F.3d 1326, 1344-45 (11th Cir. 2008) (applying AEDPA deference but finding state court's reliance on sentencing judge's denial of post-conviction relief an unreasonable application of *Strickland*); *Saranchak v. Beard,* 616 F.3d 292 (3rd Cir. 2010) ("However, the Strickland standard differs from that applied by the Pennsylvania Supreme Court on the issue of prejudice in this case. That Court employed a subjective review of the evidence introduced at the PCRA hearing and analyzed the effect it would have had on the judge presiding, and acting as factfinder, at the degree of guilt hearing."); *Griffin v. Pierce*, 622 F.3d 831 (7th Cir. 2010)("The question is not whether a particular judge would have imposed a different sentence, but rather whether there was a 'reasonable probability' that the sentence would have been different.")

Had the court applied the objective sentencer standard there exists a reasonable probability of a different result. *First,* the results of the MRI demonstrate physical injury to the brain, the type of evidence considered especially mitigating in capital cases. *See, e.g., Sears v. Upton*, 130 S. Ct. 3259, 3262 (2010); *Caro v. Ryan,* 280 F.3d 1247, 1257-1258 (9th Cir. 2002).

Second, organic brain damage was consistent with the "good guy" defense and would have addressed the sentencing judge's mistaken notion that the explosive disorder

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evidence irrelevant to the proper prejudice inquiry.

had diminished since the last sentencing.

Third, Leavitt's brain damage had a nexus to the actual crime, although this is not required for mitigating evidence. *Tennard v. Dretke*, 542 U.S. 274 (2004). An objective sentencer may well have considered this evidence of organic brain damage to be a significant factor in the consideration of alternative sentences as directed by the Idaho Supreme Court in its decision reversing the initial death sentence. While the crime itself was aggravated, Leavitt had no prior record, had strong family ties, had been an excellent prisoner, and was "atypical" of other defendants whose cases had been before the Idaho Supreme Court. As Judge Winmill concluded, given these factors, Leavitt "has established at least a reasonable probability that, but for counsel's unprofessional errors, a sentencer would conclude that he does not deserve to be executed." App. 69.

By focusing solely on the subjective beliefs of the actual sentencing judge, the Ninth Circuit erred and this Court should grant certiorari, vacate the decision and remand to the Ninth Circuit with directions to apply the proper objective standards adopted by this Court and all other circuits.

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.

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