

No. 12-35427 and 12-35450

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD A. LEAVITT,	)	
	)	
Petitioner-Appellant,	)	ON APPEAL FROM THE
	)	DISTRICT COURT FOR
vs.	)	THE STATE OF IDAHO
	)	
ARVON J. ARAVE,	)	
	)	
Respondent-Appellee.	)	
_____	)	

**PETITION FOR REHEARING AND PETITION FOR  
REHEARING EN BANC**

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## **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**

### *1. Introduction.*

Pursuant to Fed. R. App. P. 40 and 9<sup>th</sup> Cir. R. 4-1, Mr. Leavitt respectfully requests that the panel rehear the case and reconsider its decision to affirm the district court's denial of his requests for relief under Fed. R. Civ. P. 60(b), and to order that certain evidence be forwarded for independent testing. Undersigned counsel state that this request is made because material points of fact or law were overlooked in the decision, as set out below.

Further, and pursuant to Fed. R. App. P. 35, and 9<sup>th</sup> Cir. R. 35-1 to -3, Mr. Leavitt respectfully suggests that the Court should rehear the case en banc. This portion of the petition is made because the proceeding involves a question of exceptional importance and the opinion conflicts with other decisions of the Circuit. Indeed, Mr. Leavitt's execution is set to occur this coming Tuesday, June 12, 2012, at 10:00 a.m. mountain standard time.

### *2. Martinez Claim (12-35450).*

The heart of Mr. Leavitt's ineffective assistance of trial counsel claim was that counsel failed to present the testimony of a previously consulted expert witness to explain a deposit of Mr. Leavitt's blood found on a pair of brown corduroy shorts in the victim's bedroom where she was murdered. Mr. Leavitt had

admitted that his blood would be found in the room, but explained that he had visited her a week before and had had a nosebleed in her bedroom. A State expert testified, however, that on the shorts Mr. Leavitt's blood was "mixed" with that of the victim, and that the two blood types had been deposited contemporaneously.

Trial counsel had consulted with an expert serologist who had been a teacher of the State's expert. He had concluded that the two blood types were not mixed, but rather underlay or overlay each other. This fact was at least consistent with Mr. Leavitt's account of how his blood was deposited on the shorts, and further testing might have *proved* that account. Instead, counsel allowed the case to go to the jury without either calling his expert or cross-examining the State's expert over the inconsistencies between her conclusions and those of her mentor.

Mr. Leavitt has paid the price ever since. The prosecutor referred to this in closing argument as the "conclusive proof" of the case, and references to it have appeared in the opinions of every court to have considered the case since.

The panel's per curiam opinion quotes *Turner v. Calderon*, 281 F. 3d 851, 876 (9<sup>th</sup> Cir. 2002), for the proposition that the "choice of what type of expert to use is one of trial strategy," deserving deference. Slip op., p. 5. But this claim does not fault trial counsel's *choice* of experts, it faults his failure to *use* the expert he had already chosen. The per curiam opinion states that "Leavitt's trial attorneys apparently decided not to call Leavitt's expert to the stand because most

of his testimony would have corroborated the government's." *Id.* There is no evidence to support this conclusion because trial counsel was never questioned and therefore never testified regarding his failure to contest the mixing testimony. Even if he had, his testimony would have been belied by the evidence. A comparison of the two experts' reports reveals that they are indeed consistent regarding the location and typing of blood deposits found in the bedroom, but they are completely *inconsistent* on the mixing question, the most important aspect of the blood evidence.

It is true Mr. Leavitt has "pointed to no other evidence tending to show that a significant amount of time must have elapsed between the deposit of the two blood types on the clothing." *Id.* (quoting the memorandum decision of the district court). But how could he? This claim was defaulted in 1996, and he was therefore not allowed to conduct discovery or develop expert testimony in support of it. And after *Martinez* was decided just over two months ago, the district court resolved this issue against Mr. Leavitt on the merits without permitting him a reasonable opportunity to develop it.

The per curiam opinion also points out that the State produced other evidence establishing that Mr. Leavitt had left his blood at the crime scene. *Id.* This is true so far as it goes – indeed, Mr. Leavitt himself provided this evidence when he testified that he had had a nosebleed in the victim's bedroom a week

earlier. But *no other evidence* supported the mixing of the two blood types. The simple testimony of the expert would have revealed that the actual state of the blood evidence (under- or over-laid, not mixed) was completely consistent with Mr. Leavitt's account of it being deposited, and did not require a conclusion that he had bled in the room at the same time as the murder.

Rehearing and rehearing en banc is also required, however, because the Opinion does not consider the cumulative error of trial counsel's ineffectiveness and thus is in conflict with other decisions from this Circuit. See, e.g., *Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995) and *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992).

As we pointed out in *Thomas v. Hubbard*, 273 F.3d 1164 (9th Cir. 2001), "in analyzing prejudice in a case in which it is questionable whether any single trial error examined in isolation is sufficiently prejudicial to warrant reversal, this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review." *Id.* at 1178 (internal quotations omitted) (citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996)); *see also* *Whelchel v. Washington*, 232 F.3d 1197, 1212 (9th Cir. 2000) (noting that cumulative error applies on habeas review); *Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir. 1984) ("Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.").

*Daniels v. Woodford*, 428 F.3d 1181, 1213 (9th Cir. 2005). (Considering impact of trial errors including ineffective assistance of counsel.)

Here, the Opinion notes that in a prior decision, the Court denied certain claims of error finding them harmless, but the Opinion fails to consider the cumulative effects of trial counsel's failures as it must under *Strickland*. Once the impact of these significant errors are examined for their cumulative impact on the case, there exists a reasonable probability of a different result.

Trial counsel's errors began with the failure to object to a preliminary jury instruction which stated that the presumption of innocence and the requirement for proof beyond a reasonable doubt did not apply to a person who was guilty "in fact," *Leavitt v. Arave*, 383 F. 3d 809, 816-26 (9th Cir. 2004). It continued in the closing jury instructions when trial counsel requested an erroneous instruction on alibi – Mr. Leavitt's only defense – which placed the burden on Mr. Leavitt to prove alibi so as to establish a reasonable doubt. *Id.*, 383 F. 3d at 831-2. In between, trial counsel did not contest the only piece of evidence "conclusively" placing Leavitt at the scene of the murder at the time of its commission – the mixed blood on the shorts. Counsel did not object to the erroneous prosecution argument that the jury was the final link in the chain of the prosecution, *id.*, 383 F. 3d at 834-5, nor to evidence that Mr. Leavitt had displayed a knife during an unrelated sexual encounter. *Id.*, 383 F. 3d at 829.

Other errors permeated the trial. The State extensively cross examined Mr. Leavitt over his exercise of the constitutional right to remain silent at a



magistrate's inquiry. *Id.*, 383 F. 3d at 828 and 833, n. 28. The State proved that the victim had called police earlier to complain about a prowler, and had stated to a police officer dispatched to her home that she suspected it was Mr. Leavitt because he had been at her home earlier in the day, *id.*, 383 F. 3d at 830, a plain violation of *Crawford v. Washington*, 541 U.S. 36 (2004), *see Davis v. Washington*, 547 U.S. 813, 827 (2006) (defining statements describing past events as "testimonial," to which *Crawford* applies). Testimony was also presented regarding a mysterious person named "Mike Jenkins," suspected to be Mr. Leavitt, who had called the police before Ms. Elg's body was found. *Leavitt v. Arave*, 383 F. 3d at 831.

Against this backdrop, the failure to deprive the prosecution of the argument that the two blood types were "mixed," as opposed to having been deposited at separate times, which was at least consistent with Mr. Leavitt's testimony, creates a reasonable probability of a different result. Particularly when considered in light of these and other errors in the case which have been excused as harmless, has the blood evidence been properly contested there is a reasonable probability of a different outcome such that the reliability of the verdict is undermined.

*Strickland v. Washington*, 466 U.S. 668, 698 (1984). This claim is therefore "substantial" in the sense that it "has some merit." *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_ 132 S.Ct. 1309, 1318 (2012). We respectfully request that the Court reconsider its

denial of this claim.

3. *Testing claim.*

Mr. Leavitt moved the district court to order the Blackfoot Police Department to cooperate in providing evidence to an independent lab for testing. The Bingham County prosecutor had previously agreed to turn the evidence over but reneged after this Court's mandate was returned. The panel opinion concludes that Judge Winmill did not err in denying the motion because the testing would not have supported the pending Rule 60(b) motion. Slip op., p. 6. The declaration of Marc Taylor, which counsel presented to the Court in an emergency motion to supplement the record, clearly reveals that testing could have spoken to the ineffective assistance claim as well as to the clemency petition, however. The Court's motion to deny expansion of the record in this capital case requires review.

**CONCLUSION**

The panel decision should be reconsidered and habeas relief should be granted. If relief is not granted, en banc review should be granted.

Respectfully submitted this 9<sup>th</sup> day of June, 2012.

/s David Z. Nevin

David Z. Nevin

Andrew Parnes

Attorneys for Petitioner-Appellant

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C), and  
Circuit Rules 32(c)(2), 35(b)(2) and 40-1(a).

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), Circuit Rules 32(c)(2), 35(b)(2) and 40-1(a) that Petitioner filed the present Petition for Rehearing and Petition for Rehearing En Banc with a maximum of either 15 pages, 4,200 words or 390 lines of text, that the Petition is proportionally spaced, has a typeface of 14 points or more and contains words.

Dated this 9<sup>th</sup> day of June, 2012.

s/ David Z. Nevin  
David Z. Nevin  
Attorney for Petitioner-Appellant

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 9<sup>th</sup> day of June, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Debi Presher

Debi Presher

**FILED**

JUN 08 2012

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**RICHARD A. LEAVITT,**

Petitioner - Appellant,

v.

**A. J. ARAVE,**

Respondent - Appellee.

No. 12-35427

D.C. No. 1:93-cv-00024-BLW

**OPINION**

**RICHARD A. LEAVITT,**

Petitioner - Appellant,

v.

**A. J. ARAVE,**

Respondent - Appellee.

No. 12-35450

D.C. No. 1:93-cv-00024-BLW

Appeal from the United States District Court  
for the District of Idaho  
B. Lynn Winmill, Chief District Judge, Presiding

Argued and Submitted June 7, 2012  
Pasadena, California

Filed June 8, 2012

Before: **KOZINSKI**, Chief Judge, **REINHARDT** and **BERZON**, Circuit Judges.

**PER CURIAM:**

Richard Leavitt is a convicted murderer who was sentenced to death by the state of Idaho. We have dealt with his case on two prior occasions. See Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004) (Leavitt I); Leavitt v. Arave, 646 F.3d 605 (9th Cir. 2011) (Leavitt II). Subsequent to our last decision the Supreme Court denied certiorari, ending his habeas suit.

Leavitt now seeks relief under Federal Rule of Civil Procedure 60(b), claiming that Martinez v. Ryan, 132 S. Ct. 1309 (2012), renders him eligible to pursue ineffective assistance of counsel claims on which he had ostensibly defaulted. In a separate case, Leavitt petitions the district court to order the Blackfoot Police Department to send evidence related to his crime to a lab for forensic testing.

The district court denied relief in both cases. Leavitt appeals.

**1. 12-35450 (Martinez Claim).** In order to bring a successful Martinez claim, “a prisoner must . . . demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one . . . .” Martinez, 132 S. Ct. at 1319. Under Strickland v. Washington, 466 U.S. 668, 687 (1994), an ineffective

assistance claim would require Leavitt to prove his trial attorneys' performance was both "deficient" and "prejudicial" to his defense. "There may be cases where the record is devoid of sufficient information necessary to evaluate whether [post-conviction relief] counsel was ineffective [in failing to raise such a claim] and, as a result, remand under Martinez would be necessary. However, . . . that is not the case here." Sexton v. Cozner, No. 10-35055, 2012 WL 1760304, at \*9 (9th Cir. May 14, 2012).

Leavitt argues that his trial counsel was deficient in failing to object to prosecutorial misconduct at trial. We have previously addressed this claim on the merits and held that, even if one of the prosecutors' actions "deviat[ed] from propriety," it was "not enough to make any difference in the result." Leavitt I, 383 F.3d at 835. Therefore, even if trial counsel was ineffective in failing to challenge the prosecutor's actions, no prejudice resulted from such ineffectiveness.

Leavitt also claims his trial counsel should have objected to testimony from Leavitt's former girlfriend that he had once displayed a knife immediately before the two had sex. He admits, however, that we previously found this evidence standing alone to be "harmless." See Leavitt I, 383 F.3d at 829. Therefore, even if Leavitt's trial counsel was deficient under Strickland when he failed to object, this did not prejudice Leavitt's case.

Leavitt further contends that his trial counsel was deficient when he acquiesced in six reasonable doubt and presumption of innocence instructions that misstated the law. However, we previously reviewed five of the six instructions on the merits and rejected Leavitt's challenges. Leavitt I, 383 F.3d at 821–22. An instruction identical to the only other instruction was found not to be a constitutional violation when read “in the context of the instructions [read in that case] overall.” Rhoades v. Henry, 638 F.3d 1027, 1044–45 (9th Cir. 2011); see also Leavitt I, 383 F.3d at 820 (“[R]easonable jurists in 1989 [, the year the Idaho Supreme Court handed down its decision in Leavitt’s state case,] would still not have felt compelled by [Ninth Circuit caselaw] to find that [the jury instruction] was constitutional error . . . .”). Leavitt’s counsel’s failure to object was not deficient under Strickland.

Finally, Leavitt claims his trial attorneys erred by failing to have his expert witness testify that two of the blood samples found together at the scene of the crime had not mixed and thus were not deposited at the same time. “The choice of what type of expert to use is one of trial strategy and deserves a ‘heavy measure of deference.’” Turner v. Calderon, 281 F.3d 851, 876 (9th Cir. 2002). Leavitt’s trial attorneys apparently decided not to call Leavitt’s expert to the stand because most of his testimony would have corroborated the government’s. Regardless, the



failure to introduce the testimony of Leavitt's expert witness doesn't rise to the level of Strickland prejudice, which requires a showing of a "reasonable probability . . . [that] the result of the proceeding would have been different" if not for the attorney's errors. Strickland, 466 U.S. at 694. As the district court stated, "Leavitt has pointed to no other evidence tending to show that a significant amount of time must have elapsed between the deposit of the two blood types on the clothing." Memorandum Decision and Order, Leavitt v. Arave, No. 1:93-cv-0024 (D. Idaho June 1, 2012). And, the state produced other evidence that Leavitt had left his blood at the crime scene at the time of the killing. Id.

**2. No. 12-35427 (Testing Claim).** Leavitt also asks the district court to compel the Blackfoot Police Department to submit for forensic testing blood samples taken from the crime scene. He concedes that the testing motion "addresses primarily concerns with clemency proceedings." He argues the district court has jurisdiction to provide discovery in support of his pending Rule 60(b) motion in his habeas case. He has not shown good cause for such a discovery request, however, as he has not explained how the testing that he seeks would substantiate his underlying claim that his trial counsel was ineffective in failing to obtain appropriate testimony from his serology expert.

As to clemency, Leavitt argues that the district court has jurisdiction to grant the testing motion under 18 U.S.C. § 3599(f), so he can use it in support of his state clemency petition. But, section 3599(f) provides for “nothing beyond . . . funding power” and doesn’t “empower the court to order third-party compliance” with Leavitt’s attorneys’ investigations. See Baze v. Parker, 632 F.3d 338, 342–43 (6th Cir. 2011).

**AFFIRMED.**

**Counsel**

David Z. Nevin, Nevin, Benjamin, McKay & Bartlett LLP, Boise, ID and Andrew Parnes, Ketchum, ID for appellant Richard A. Leavitt.

Lawrence G. Wasden, L. LaMont Anderson, Alan G. Lance and Jessica Marie Lorello, Idaho Attorney General's Office, Boise, ID, for appellee A.J. Arave.

*Leavitt v. Arave*, Nos. 12-35427, 12-35450

REINHARDT, Circuit Judge, concurring:

I am not free to do other than join fully in the court's per curiam opinion affirming the denial of Leavitt's motion for relief from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. I write separately only to explain my disagreement with the current state of the law which permits the execution of individuals, including Leavitt, on the basis of trials and sentencing proceedings that do not afford them the protections and process that the Constitution requires. In my opinion, it is not good enough that capital defendants are convicted on the basis of instructions that misstate the meaning of reasonable doubt or tell the jury, in violation of the Due Process Clause, that constitutional protections are intended for the benefit of the innocent only. Capital defendants do not, in my view, receive an adequate sentencing hearing when a lawyer fails to follow through on a medical expert's advice that the defendant receive a brain scan in order to determine whether he suffers from an injury or ailment that may fundamentally affect his judgment or his conduct. It is not good enough that we forfeit a capital defendant's legitimate constitutional claims because his lawyers failed to comply with the impenetrable procedural rules designed to make habeas relief unavailable to all but the most fortunate and even to deny such relief regardless of the merits of a defendant's claims if the state judges' erroneous interpretation of the Constitution could have been made by reasonable judges. We are

far too willing in capital cases to accept the results of trials that are marked by errors on the assumption that those errors did not influence the jury. As long as we are willing to treat capital punishment as an acceptable form of administering justice in our society, the proper approach, under my view of the Constitution, would be to insist that, as the Supreme Court once said, “Death is different,” and not permit the execution of individuals by the state as a result of proceedings that fail to comply in all respects with the dictates of the Constitution. Error is simply not harmless, nor is it acceptable, when it is part of a process that leads to a state’s putting its citizens to death.

The long procedural history of this case reads like a textbook account of the obstacles to justice erected by modern habeas doctrine. In 1996, the district court held that Leavitt’s claims regarding the ineffectiveness of his trial and resentencing counsel were procedurally defaulted. In doing so, the district court relied on a rule—recently changed by the Supreme Court—that any ineffectiveness on the part of a petitioner’s state post-conviction counsel could not excuse the procedural default of his claims. Four years later, the district court granted a writ of habeas corpus on the basis of an unlawful jury instruction. We reversed the grant of habeas relief on the ground that the jury instruction claim was barred by the non-retroactivity doctrine of *Teague v. Lane*. In a footnote, we noted that the district court had been wrong to dismiss as

procedurally defaulted all of Leavitt's claims as to the ineffectiveness of his trial counsel, but—with almost no analysis—we held that the two non-defaulted claims failed on the merits. We also reversed the district court's ruling that Leavitt's claim concerning the ineffectiveness of his resentencing counsel was procedurally barred, and we remanded for that claim to be heard. On remand, the district court again granted a writ of habeas corpus on the basis that Leavitt's counsel had been constitutionally ineffective. Yet again, we reversed the grant of relief. Now we confront a motion for relief from the judgment that the rules prevent us from granting.

Nearly absent from this litany is any discussion of what ought to be the focus of federal habeas review—whether Leavitt received a fair trial and sentencing proceeding that respected his rights under the Federal Constitution. Instead, the case remained in the federal courts for nearly two decades as the result of a series of disagreements about whether various procedural requirements were or were not satisfied at each of various stages in the state and federal proceedings. Comity has value. The habeas jurisdiction of the federal courts is not unlimited. At some point, however, these uncontroversial premises have been transformed into a set of strictures that prevents all but the most unusual of petitioners—those whose counsel have managed to comply at every turn with the ceaselessly changing and ever expanding

series of rules—from presenting the merits of their constitutional claims to any federal court. This harsh and mechanical process undermines the protection of the Great Writ.

Leavitt’s trial and sentencing failed, at numerous points, to comply with the Constitution. As we recognized in our first opinion in this case, one of the instructions given to the jury—an instruction “that the presumption of innocence is not intended to aid the guilty-in-fact”—has for at least half a century been recognized by our court as erroneous. *See Reynolds v. United States*, 238 F.2d 460, 463 (9th Cir. 1956). In *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam), the Supreme Court held that an unlawful definition of reasonable doubt by a state court violates the Federal Constitution. Because Leavitt had the misfortune to be convicted before *Cage* was decided, however, his claim was barred by *Teague*—notwithstanding that by the time his case reached our court, *Cage* had been the law for a decade and a half. In other words, we told Leavitt, we know that your jury instruction violated the longstanding law of our Circuit, but you lose because the Supreme Court had not yet made clear by the time of your conviction that such a violation by a state court offends the Federal Constitution.

Then there were the multiple instances in which the trial violated Leavitt’s rights in ways that we held were not quite bad enough to have changed the outcome. First, although a jury instruction “imposed the burden of proving an alibi on Leavitt,

which is clearly wrong,” we found no reasonable likelihood “that this instruction . . . caused Leavitt’s jury to base his conviction on a degree of proof below that required by the Due Process Clause,” 383 F.3d at 822, or that any reasonable juror “would have bought his alibi,” *id.* at 833. Second, although it “was arguably improper” for the prosecutor “to comment upon [Leavitt’s] exercise of his right to remain silent” at an “arguably . . . judicial . . . proceeding,” we held that “any error was harmless.” *Id.* at 828. Third, although any rationale for admitting evidence that Leavitt had displayed a knife during a previous sexual encounter “was pretty thin,” and the rationale for admitting other knives was “[t]hinner still,” we were unwilling to say that “the knife evidence . . . had substantial and injurious effect or influence in determining the jury’s verdict.” *Id.* at 829 (internal quotation marks omitted). Fourth, although the prosecutor committed serious misconduct by arguing to the jury that it was “a link in a chain of law enforcement which includes the police, the prosecutor, and the judge,” we did not conclude “that the trial was so infected with unfairness as to be a denial of due process” or that “this deviation from propriety was . . . enough to make any difference in the result.” *Id.* at 834-35. The harmless error doctrine led us to look past numerous violations of the Constitution on the basis of our *own* judgment, not the jury’s, that the evidence against Leavitt was strong.



Next, our second reversal of habeas relief constituted a legal error and worked a serious injustice. As I wrote in dissent from that decision, had Leavitt’s counsel on resentencing “made a motion for the MRI examination of his brain that the court-appointed neurologist had recommended,” that “examination would have revealed Leavitt’s organic neurological disorder—powerful mitigating evidence that could well have altered the sentencing decision of the trial court.” *Leavitt v. Arave*, 646 F.3d 605, 617 (9th Cir. 2011) (Reinhardt, J., dissenting). That failure “necessarily undermines any reasonable jurist’s confidence in the outcome of the sentencing proceeding,” and the majority decision to the contrary “disregard[ed] the controlling law and the compelling facts of this case.” *Id.* at 626.

There is one further problem that Leavitt’s case illustrates: under current law, defendants, even capital defendants, have no constitutional right to require the state to provide evidence in its possession for DNA testing. Leavitt belatedly sought such evidence, and the State advised us that the decision whether to release it was up to the Chief of Police of Blackfoot. Surely, where evidence of this importance may in some cases—especially in some capital cases—definitively answer the question of guilt or innocence, the Constitution must provide a better method of determining whether that evidence may be tested before the State executes a defendant.

As noted at the outset, I recognize that the law requires us to do what we have just done—ended Leavitt’s last chance that the Constitution would be complied with before he is executed by the State. This result, however, reflects the deplorable state of the law rather than a determination (on my part, at least) that Leavitt has in fact been treated fairly. Whether or not the very existence of capital punishment comports with the Constitution—a question which, for now, the Supreme Court has resolved—we must demand a higher standard of constitutional values in capital trials, and we must afford condemned prisoners a full opportunity to be heard on their constitutional claims before we send them to their deaths. We are failing to meet these obligations today.

*Leavitt v. Arave*, Nos. 12-35427, 12-35450

REINHARDT, Circuit Judge, concurring:

I am not free to do other than join fully in the court's per curiam opinion affirming the denial of Leavitt's motion for relief from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. I write separately only to explain my disagreement with the current state of the law which permits the execution of individuals, including Leavitt, on the basis of trials and sentencing proceedings that do not afford them the protections and process that the Constitution requires. In my opinion, it is not good enough that capital defendants are convicted on the basis of instructions that misstate the meaning of reasonable doubt or tell the jury, in violation of the Due Process Clause, that constitutional protections are intended for the benefit of the innocent only. Capital defendants do not, in my view, receive an adequate sentencing hearing when a lawyer fails to follow through on a medical expert's advice that the defendant receive a brain scan in order to determine whether he suffers from an injury or ailment that may fundamentally affect his judgment or his conduct. It is not good enough that we forfeit a capital defendant's legitimate constitutional claims because his lawyers failed to comply with the impenetrable procedural rules designed to make habeas relief unavailable to all but the most fortunate and even to deny such relief regardless of the merits of a defendant's claims if the state judges' erroneous interpretation of the Constitution could have been made by reasonable judges. We are

far too willing in capital cases to accept the results of trials that are marked by errors on the assumption that those errors did not influence the jury. As long as we are willing to treat capital punishment as an acceptable form of administering justice in our society, the proper approach, under my view of the Constitution, would be to insist that, as the Supreme Court once said, “Death is different,” and not permit the execution of individuals by the state as a result of proceedings that fail to comply in all respects with the dictates of the Constitution. Error is simply not harmless, nor is it acceptable, when it is part of a process that leads to a state’s putting its citizens to death.

The long procedural history of this case reads like a textbook account of the obstacles to justice erected by modern habeas doctrine. In 1996, the district court held that Leavitt’s claims regarding the ineffectiveness of his trial and resentencing counsel were procedurally defaulted. In doing so, the district court relied on a rule—recently changed by the Supreme Court—that any ineffectiveness on the part of a petitioner’s state post-conviction counsel could not excuse the procedural default of his claims. Four years later, the district court granted a writ of habeas corpus on the basis of an unlawful jury instruction. We reversed the grant of habeas relief on the ground that the jury instruction claim was barred by the non-retroactivity doctrine of *Teague v. Lane*. In a footnote, we noted that the district court had been wrong to dismiss as

procedurally defaulted all of Leavitt's claims as to the ineffectiveness of his trial counsel, but—with almost no analysis—we held that the two non-defaulted claims failed on the merits. We also reversed the district court's ruling that Leavitt's claim concerning the ineffectiveness of his resentencing counsel was procedurally barred, and we remanded for that claim to be heard. On remand, the district court again granted a writ of habeas corpus on the basis that Leavitt's counsel had been constitutionally ineffective. Yet again, we reversed the grant of relief. Now we confront a motion for relief from the judgment that the rules prevent us from granting.

Nearly absent from this litany is any discussion of what ought to be the focus of federal habeas review—whether Leavitt received a fair trial and sentencing proceeding that respected his rights under the Federal Constitution. Instead, the case remained in the federal courts for nearly two decades as the result of a series of disagreements about whether various procedural requirements were or were not satisfied at each of various stages in the state and federal proceedings. Comity has value. The habeas jurisdiction of the federal courts is not unlimited. At some point, however, these uncontroversial premises have been transformed into a set of strictures that prevents all but the most unusual of petitioners—those whose counsel have managed to comply at every turn with the ceaselessly changing and ever expanding

series of rules—from presenting the merits of their constitutional claims to any federal court. This harsh and mechanical process undermines the protection of the Great Writ.

Leavitt’s trial and sentencing failed, at numerous points, to comply with the Constitution. As we recognized in our first opinion in this case, one of the instructions given to the jury—an instruction “that the presumption of innocence is not intended to aid the guilty-in-fact”—has for at least half a century been recognized by our court as erroneous. *See Reynolds v. United States*, 238 F.2d 460, 463 (9th Cir. 1956). In *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam), the Supreme Court held that an unlawful definition of reasonable doubt by a state court violates the Federal Constitution. Because Leavitt had the misfortune to be convicted before *Cage* was decided, however, his claim was barred by *Teague*—notwithstanding that by the time his case reached our court, *Cage* had been the law for a decade and a half. In other words, we told Leavitt, we know that your jury instruction violated the longstanding law of our Circuit, but you lose because the Supreme Court had not yet made clear by the time of your conviction that such a violation by a state court offends the Federal Constitution.

Then there were the multiple instances in which the trial violated Leavitt’s rights in ways that we held were not quite bad enough to have changed the outcome. First, although a jury instruction “imposed the burden of proving an alibi on Leavitt,

which is clearly wrong,” we found no reasonable likelihood “that this instruction . . . caused Leavitt’s jury to base his conviction on a degree of proof below that required by the Due Process Clause,” 383 F.3d at 822, or that any reasonable juror “would have bought his alibi,” *id.* at 833. Second, although it “was arguably improper” for the prosecutor “to comment upon [Leavitt’s] exercise of his right to remain silent” at an “arguably . . . judicial . . . proceeding,” we held that “any error was harmless.” *Id.* at 828. Third, although any rationale for admitting evidence that Leavitt had displayed a knife during a previous sexual encounter “was pretty thin,” and the rationale for admitting other knives was “[t]hinner still,” we were unwilling to say that “the knife evidence . . . had substantial and injurious effect or influence in determining the jury’s verdict.” *Id.* at 829 (internal quotation marks omitted). Fourth, although the prosecutor committed serious misconduct by arguing to the jury that it was “a link in a chain of law enforcement which includes the police, the prosecutor, and the judge,” we did not conclude “that the trial was so infected with unfairness as to be a denial of due process” or that “this deviation from propriety was . . . enough to make any difference in the result.” *Id.* at 834-35. The harmless error doctrine led us to look past numerous violations of the Constitution on the basis of our *own* judgment, not the jury’s, that the evidence against Leavitt was strong.

Next, our second reversal of habeas relief constituted a legal error and worked a serious injustice. As I wrote in dissent from that decision, had Leavitt’s counsel on resentencing “made a motion for the MRI examination of his brain that the court-appointed neurologist had recommended,” that “examination would have revealed Leavitt’s organic neurological disorder—powerful mitigating evidence that could well have altered the sentencing decision of the trial court.” *Leavitt v. Arave*, 646 F.3d 605, 617 (9th Cir. 2011) (Reinhardt, J., dissenting). That failure “necessarily undermines any reasonable jurist’s confidence in the outcome of the sentencing proceeding,” and the majority decision to the contrary “disregard[ed] the controlling law and the compelling facts of this case.” *Id.* at 626.

There is one further problem that Leavitt’s case illustrates: under current law, defendants, even capital defendants, have no constitutional right to require the state to provide evidence in its possession for DNA testing. Leavitt belatedly sought such evidence, and the State advised us that the decision whether to release it was up to the Chief of Police of Blackfoot. Surely, where evidence of this importance may in some cases—especially in some capital cases—definitively answer the question of guilt or innocence, the Constitution must provide a better method of determining whether that evidence may be tested before the State executes a defendant.



As noted at the outset, I recognize that the law requires us to do what we have just done—ended Leavitt’s last chance that the Constitution would be complied with before he is executed by the State. This result, however, reflects the deplorable state of the law rather than a determination (on my part, at least) that Leavitt has in fact been treated fairly. Whether or not the very existence of capital punishment comports with the Constitution—a question which, for now, the Supreme Court has resolved—we must demand a higher standard of constitutional values in capital trials, and we must afford condemned prisoners a full opportunity to be heard on their constitutional claims before we send them to their deaths. We are failing to meet these obligations today.