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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RICHARD A. LEAVITT, Petitioner, vs. A.J. ARAVE, Respondent.	)	CASE NO. 1:93-cv-00024-BLW **CAPITAL CASE** RESPONSE TO PETITIONER'S EMERGENCY MOTION FOR ORDER TO SUBMIT EVIDENCE FOR TESTING

COMES NOW, Respondent, A.J. Arave ("state"), by and through his attorney, L. LaMont Anderson, Deputy Attorney General and Chief, Capital Litigation Unit, and does hereby respond to Petitioner's ("Leavitt") Emergency Motion for Order to Submit Evidence for Testing (Dkt. 330) by objecting to the same.

BACKGROUND

The Court is familiar with the facts that led to Leavitt's conviction for the first-degree murder of Danette Elg and imposition of the death penalty after he was resentenced. During the course of Leavitt's trial, blood evidence was admitted establishing he was in Danette's home at the time of her murder. As detailed by the Ninth Circuit:

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

Leavitt v. Arave, 383 F.3d 809, 815 (9th Cir. 2004).

During trial preparation, Leavitt's attorneys attempted to confront the blood evidence by consulting with a serologist, Dr. Ed Blake, who "analyzed a lot of the blood samples that were also analyzed by Ann Bradley for the State. For the most part his findings were consistent with those of Ann Bradley." (State's lodging B-2, pp.153-54.)

During post-conviction proceedings, Jay Kohler, one of Leavitt's trial attorneys, further discussed Dr. Blake's involvement:

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

(Id., p.154.) After consulting with other attorneys, a tactical decision was made by Leavitt's attorneys to not have Dr. Blake testify because "it would emphasize the strongest part of the State's case." (Id., p.155.)

On April 29, 1993, Leavitt filed his initial Petition for Writ of Habeas Corpus (Dkt. 13), which was amended on February 20, 1996, and contained a claim of ineffective assistance of counsel based upon trial counsels' alleged failure to "counter the forensic serology evidence introduced by the state." (Dkt. 41, p.23, ¶70.) At no time during habeas proceedings has Leavitt previously requested testing of any of the evidence that was gathered by police or introduced at trial. Moreover, despite passage in 2001 of a new post-conviction statute in Idaho that allowed for DNA testing, *see* 2001 Idaho Sess. Laws 1126 (codified at I.C. §§ 19-2719(4), 19-4902), Leavitt has never filed a "DNA Post-Conviction Petition" seeking testing of any of the evidence gathered by police or introduced at trial.

After various appeals, of which this Court is aware, the Supreme Court denied Leavitt's latest Petition for Certiorari on May 14, 2012 (Dkt. 321) and the Ninth Circuit's

Mandate issued two days later on May 16, 2012 (Dkt. 320). As a result of issuance of the Mandate, on May 17, 2012, the state sought and received a Death Warrant for Leavitt's execution on June 12, 2012. (Dkt. 327, Appendix A.)

Apparently, on May 17, 2012, without notice to the state, this Court approved Leavitt's request for funding "to conduct testing of certain blood samples from the crime scene." (Dkt. 330-1, p.1.) Leavitt's attorneys "immediately began efforts to reach the Bingham County Prosecutor, Mr. J. Scott Andrew, to request that he forward the evidence to a lab [they] had contacted in Salt Lake City, UT, and which was willing and able to conduct the testing on an expedited basis." (Id., p.2.) Counsel had difficulty contacting Andrew, but on May 21, 2012, Andrew sent counsel a letter declining to release the evidence, which apparently is in the custody of the Blackfoot Police Department, because Andrew does "not believe [he has] the authority to order them to send it anywhere, and even assuming [he] did, [is] unwilling to issue such a directive." (Id., Exhibit C, p.1.) Andrew expressly noted I.C. § 19-4902, Leavitt's failure to seek DNA testing within the time frame required by the statute, and his belief that Leavitt's current request "makes it clear that it is merely a tactic to delay Mr. Leavitt's execution." (Id.)

On May 21, 2012, at approximately 5:14 p.m., Leavitt filed the instant motion asking this Court for an Order directing the Blackfoot Police Department to forward to Sorenson Forensics, the following items "for forensic testing": (1) shirt; (2) sex crime kit; (3) tan corduroy shorts; (4) pale lavender panties; (5) locking mechanism; and (6) "R. Leavitt blood reference." (Dkt. 330.) Leavitt's motion is presumably based upon the alleged need to "prepare the commutation or clemency petition." (Dkt. 330-1, p.3, ¶9.)

ARGUMENT

A. This Court Is Without Jurisdiction To Grant Leavitt's Motion

Leavitt has not provided any basis for this Court's authority or jurisdiction to require the state to release evidence to a facility for "forensic testing" for commutation proceedings. The state is aware that in Harbison v. Bell, 556 U.S. 180, 194 (2009), the Supreme Court explained prisoners who are financially unable to obtain counsel for clemency or commutation proceedings are entitled to the assistance of federally-funded counsel under 18 U.S.C § 3599. Additionally, § 3599(f) provides:

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefore….

However, at least one federal court has concluded § 3599 does not "empower the court to order third-party compliance with the attorney's investigations" because "[s]uch a broad oversight power is in tension with the longstanding principle that we do not sit as super appeals courts over state commutation proceedings." Baze v. Parker, 632 F.3d 338, 342 (6th Cir. 2011). The court explained that while § 3599 provides for federally-funded counsel and investigative services, it "provides for nothing beyond this funding power." Id. at 343. Neither does Harbison provide any basis for jurisdiction because it merely provided for "meaningful access," which "is access to federally-funded counsel, not federal oversight of the discovery process in a state proceeding." Therefore, "without any clear textual underpinning [from § 3599], we cannot infer an [sic] Congressional intent to interfere with state proceedings to such a remarkable extent." Id. Finally, the court addressed the allegedly "'absurd result' of allowing courts to authorize certain

investigative services, yet leaving them powerless to stop state 'interference' with the efforts of the investigation," explaining that while § 3599(f) "allows an attorney to hire an investigator; it does not ensure that the investigator will succeed." Id. at 344. In other words, "Section 3599 allows a federal court to approve the expenditures of federal funds, not usurp oversight of the discovery process in a state proceeding." Id. Therefore, "[i]n line with that limited power, the only determination that the federal court may make under 3599(f) is whether the investigative services are 'reasonably necessary.'" Id. While recognizing state inference to obtain evidence supporting a state clemency application "could be a problem," the "solution is more appropriately fashioned in state court and, in any case, is nowhere to be found in 18 U.S.C. § 3599." Id.

Because Leavitt has not articulated from where this Court obtains jurisdiction to order the state to release evidence, particularly evidence that was admitted at his trial, and because § 3599(f) does not provide that authority, his instant motion must be denied.

B. Leavitt Has Failed To Establish Good Cause For This Court To Order Release Of State Evidence

Should this Court conclude it does have jurisdiction to grant Leavitt's motion, it must still be denied under the standard rubric for discovery in a federal habeas case because he has not demonstrated good cause to release the evidence. "A habeas petitioner does not enjoy the presumptive entitlement to discovery of a traditional civil litigant." Rich v. Calderon, 187 F.3d 1064, 1068 (9th Cir. 1999). Even under pre-AEDPA law, Leavitt is not entitled to embark upon a fishing expedition, but must establish "good cause." Rule 6(a) of the Rules Governing Section 2254 Cases.

This rule was promulgated as a result of the Supreme Court's decision in Harris v. Nelson, 394 U.S. 286, 295 (1969). In Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) (quoting Harris, 394 U.S. at 299), the Supreme Court reaffirmed Harris, concluding, "Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry."

However, the Bracy Court reaffirmed that good cause must still be shown before discovery may be ordered. Additionally, "the scope and extent of such discovery is a matter confided to the discretion of the District Court." Id. at 909; *see also* Rich, 187 F.3d at 1068. "Good cause" is not the equivalent of relevancy. Campbell v. Blodgett, 982 F.2d 1356, 1359 (9th Cir. 1993). Further, "generalized statements about the possible existence of material do not constitute 'good cause.' Rather, a petitioner must produce specific evidence that supports his claim that the requested material exists." Green v. Artuz, 990 F.Supp. 267, 271 (S.D. New York 1998); *see also* Deputy v. Taylor, 19 F.3d 1485, 1493 (3rd Cir. 1994) (citing Munoz v. Keane, 777 F.Supp. 282, 287 (S.D.N.Y. 1991) ("[P]etitioners are not entitled to go on a fishing expedition through the government's files in hopes of finding some damaging evidence"). The Ninth Circuit has specifically stated, "courts should not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation." Calderon v. United States District Court, ex rel. Nicholaus, 98 F.3d 1102, 1106 (9th Cir. 1996).

Not only has Leavitt failed to demonstrate "good cause" for release of not only evidence collected at the murder scene but evidence **admitted** at trial, he has

demonstrated "no cause," but merely assumes he is entitled to test items that in fact may have already been tested by Dr. Blake. Leavitt merely contends the items should be released "for forensic testing" (Dkt. 330, p.1), but fails to articulate what kind of testing will be completed, how long it will take, whether the items will be consumed as a result of the testing, or any other information regarding the scope or type of "forensic testing" being requested. Moreover, Leavitt has provided no information, at least to undersigned counsel, regarding Sorenson Forensics and whether this is a reputable facility that can complete the unknown testing he desires. Obviously, the state has an interest in preserving the evidence collected at the murder scene, particularly those exhibits admitted during Leavitt's trial.

In Dist. Attorney's Office v. Osborne, 557 U.S. 52, 62 (2009), the Supreme Court recognized the significance DNA testing can provide, but recognized "[t]he dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice." Reviewing what the states were doing "to ensure the fair and effective use of this testing within the existing criminal justice framework, the Court concluded, "That task belongs primarily to the legislature." Id. at 63. As explained by the Court, "These laws recognize the value of DNA evidence but also the need for certain conditions on access to the State's evidence." Id. While Osborne filed his claim under 42 U.S.C. § 1983 and the state asserted it should have been brought as a federal habeas claim, the Court concluded resolution of the question did not require it to resolve "this difficult issue," id. at 66-67, and that irrespective he was not denied due process because of the state's refusal to permit DNA testing, id. at 67-72. Moreover, the Court chastised Osborne's attempt to sidestep state process by filing a federal lawsuit,

concluding it put him "in a very awkward position" because "[i]f he simply seeks the DNA through the State's discovery procedures, he might well get it. If he does not, it may be for a perfectly adequate reason, just as the federal statute and all state statutes impose conditions and limits on access to DNA evidence. It is difficult to criticize the State's procedures when Osborn has not invoked them." Id. at 71. As Justice Alito explained, "We also have long recognized the need to impose sharp limits on state prisoners' efforts to bypass state courts with their discovery requests," which prevents "opportunities for sandbagging on the part of defense lawyers and it reduces the inevitable friction that results when a federal habeas court overturns either the factual or legal conclusions reached by the state-court systems." Id. at 77 (J. Alito, concurring). Moreover, "[i]t is no answer to say, as respondent does, that he simply wants to use § 1983 as a discovery tool to lay the foundation for a future state postconviction application, a state clemency petition, or a request for relief by means of 'prosecutorial consent.'" Id. at 78.

Additionally, as explained by Justice Alito, "the State has important interests in maintaining the integrity of its evidence, and the risks associated with evidence contamination increase every time someone attempts to extract new DNA from a sample." Osborne, 557 U.S. at 82 (Alito, J., concurring). Justice Alito also recognized, "modern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence," particularly in light of the "intentional DNA-evidence-tampering scandals that have surfaced in recent years." Id.

While Osborne involved a § 1983 action stemming from a request for DNA testing, its principles can be applied to Leavitt's request, particularly since the type of

"forensic testing" he desires to have completed has not been disclosed. Like in Osborne, Leavitt has not "invoked" the procedures that were provided in I.C. § 19-4902. In fact, until yesterday, Leavitt had not sought this kind of discovery in any fashion, even in habeas. Rather, Leavitt has now embarked upon a strategy of waiting until the eve of his execution to seek "forensic testing" of the items and then casting blame at the state's doorstep for complying with I.C. § 19-2715(2) (2012) by obtaining a new Death Warrant after issuance of the Ninth Circuit's Mandate and not capitulating to his untimely request to release the evidence for unknown testing to an unknown facility after the Mandate and Death Warrant were issued. This simply does not constitute good cause for release of the evidence, but is nothing more than a fishing expedition and tactic to delay Leavitt's scheduled execution. Leavitt has also failed to address the state's interest in maintaining the integrity of the evidence because information regarding what testing will be completed, the testing facility, and what safeguards are in place to preserve the integrity of the evidence, have never been disclosed to undersigned counsel.

Leavitt also complains that he has not been provided with the "fact or results" of testing that was apparently completed "at about the time of Judge Winmill's decision that vacated Mr. Leavitt's conviction." (Dkt. 330-1, p.4, ¶11.) Leavitt has since explained he was provided a copy of a report from a latent print examiner from King County, Washington, who "examined a t-shirt, and was unable to develop latent prints from it." (Dkt. 331, p.2, ¶2.) Irrespective, the state fails to understand, even if additional testing of unknown evidence was completed by the state after this Court ordered Leavitt's retrial, how this constitutes good cause or any other basis for ordering the state to release

evidence for unknown "forensic testing" to Sorenson Forensics, an entity that is completely unknown to the state, for purposes of his commutation petition.

This Court lacks jurisdiction to grant Leavitt's motion. However, even if the Court has jurisdiction, because Leavitt has failed to meet his burden of establishing good cause for an order that requires the state to release evidence, some of which was admitted at trial, his instant motion must be denied.

CONCLUSION

The state respectfully requests that Leavitt's Emergency Motion for Order to Submit Evidence for Testing be denied.

DATED this 22nd day of May, 2012.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on or about the 22nd day of May, 2012, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

David Nevin Nevin, Benjamin, McKay & Bartlett P.O. Box 2772 Boise, ID 83701	_____ U.S. Mail _____ Hand Delivery _____ Overnight Mail _____ Facsimile __X__ Electronic Court Filing
Andrew Parnes Law Office of Andrew Parnes P.O. Box 5988 Ketchum, ID 83340	_____ U.S. Mail _____ Hand Delivery _____ Overnight Mail _____ Facsimile __X__ Electronic Court Filing

/s/
L. LaMONT ANDERSON