UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RICHARD A. LEAVITT,

Petitioner,

v.

A.J. ARAVE, Warden, Idaho Maximum Security Institution,

Respondent.

Case No. 1:93-cv-0024-BLW

ORDER

Before the Court is Petitioner's Motion to Reconsider Emergency Motion for Order to Submit Evidence for Testing and For Order Shortening Time for Response. (Dkt. 340.) Petitioner argues that the Court should reconsider its denial of his request to order the Blackfoot Police Department to release blood samples for DNA testing so that he can develop evidence in support of his state commutation petition. (Dkt. 340-1, p. 1.) Petitioner asserts that the Court's decision is inconsistent with its previous order requiring Respondent to allow Petitioner access to an expert for an interview at the prison. (*Id*. at 2-3.) Petitioner claims that the same facts and circumstances exist in both situations, and that the Court offered only distinctions without a difference. (*Id*. at 3.)

Whatever might be said about whether the factual distinctions between the two requests should support different legal conclusions, the heart of the Court's more recent

order is its finding that it lacks jurisdiction to order a non-cooperative third party to release evidentiary material to assist Petitioner in developing his state commutation petition under either 18 U.S.C. § 3599 or the All Writs Act, 28 U.S.C. § 1651. Petitioner has not convinced the Court that its reasoning on that point is unsound or should be reconsidered. Nor has he directed the Court to any binding or persuasive authority that supports a contrary conclusion, and the Court is not aware of any. A federal district court is one of limited jurisdiction, and it cannot exercise a power that it does not have.

To support his argument, Petitioner again relies on Judge Cole's concurrence in *Baze*. (Dkt. 340-1, p. 3.) There, Judge Cole expressed his opinion, not joined by the two other judges on the panel, that a district court may have a limited power under § 3599 to prevent state interference that would otherwise render the right to federally-funded counsel essentially meaningless. *Baze v. Parker*, 632 F.3d 338, 346-47 (6th Cir. 2011) (Cole, J., concurring). Judge Cole provided examples of such interference as "state action that prevents the § 3599–appointed attorney from meeting with the defendant or otherwise consulting with the defendant about services the court found to be 'reasonably necessary.'" *Id.* at 346-47. But even Judge Cole agreed that the district court could not order state prison personnel to "cooperate" with defense counsel's requests for interviews as a means of developing evidence in support of a clemency application. *Id*. at 346. Here, the State has not prevented Petitioner from consulting with his appointed counsel, and its refusal to release the blood samples that Petitioner seeks is akin to the lack of "cooperation" in evidentiary development in the state clemency process that the *Baze*

Court found could not remedied under § 3599.

After having the benefit of fuller briefing and argument on this issue, the Court finds that if it erred in addressing either of Petitioner's recent requests, its error would have been in ordering Respondent to allow Petitioner's expert to meet with him rather than in finding that it lacked jurisdiction to order a state official to release evidence to support his commutation petition. *See*, *e.g.*, *Beaty v. Ryan*, 413 Fed. Appx. 964, 965-66 (9th Cir. 2011) ("*Harbison* provides no support for Beaty's argument that section 3599 confers jurisdiction on district courts to issue orders to state prisons in furtherance of these state clemency applications.") In any event, the expert's examination has already taken place, and that issue is now moot.

The Court is not persuaded by Petitioner's other arguments for reconsideration, and his Motion will be denied.[1]

[1] As the Court noted previously, absent a clear source of jurisdiction for the Court to compel third parties to assist Petitioner in developing his state commutation petition, such interference in state proceedings would violate core principles of federalism. (Dkt. 335, p. 5.) Petitioner counters that the State – presumably meaning the Deputy Attorney General in this case – has "conceded" that he has no remedy available in state court. (Dkt. 340-1, p. 5.) But based on the information presently before the Court, it appears that Petitioner has never attempted to seek this type of relief in any state court, such as through a habeas corpus action brought in state district court or in the Idaho Supreme Court under Idaho Code § 19-4202 or the broader authority of Art. I, § V of the Idaho Constitution, a successive post-conviction petition, or some other action or procedure. To the extent that a state avenue of relief that was once open may now be closed, there may be sound prudential reasons for why that is the case.

ORDER

IT IS ORDERED that Petitioner's Motion to Reconsider Emergency Motion for Order to Submit Evidence for Testing and for Order Shortening Time for Response (Dkt. 340) is DENIED.

DATED: **May 25, 2012**

Honorable B. Lynn Winmill
Chief U. S. District Judge