NO. 12-35427

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD A. LEAVITT,

Petitioner-Appellant,

v.

A.J. ARAVE,

Respondent-Appellee.

Appeal From the United States District Court
In the District of Idaho,
The Honorable B. Lynn Winmill, Presiding

RESPONDENT-APPELLEE'S ANSWERING BRIEF

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STATEMENT OF JURISDICTION

Petitioner-Appellee Richard A. Leavitt ("Leavitt") filed his initial Petition for Writ of Habeas Corpus on April 29, 1993. (Dkt. 13.)[1] The district court had jurisdiction pursuant to 28 U.S.C. § 2254. Leavitt v. Arave, 383 F.3d 809, 815 (9th Cir. 2004). However, whether the district court had jurisdiction to grant Leavitt's Emergency Motion for Order to Submit Evidence for Testing ("Motion to Submit"), which is the subject of this appeal, is addressed in the argument below.

While Leavitt's appeal is timely, Fed. R. App. P. 4(a)(4), because he is appealing from an interlocutory order, this Court is without jurisdiction to hear his appeal. However, should this Court conclude the Order denying his Motion to Submit is final, this Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(c). Leavitt, 383 F.3d at 815.

[1] The following references are used in this brief: "Dkt." refers to the federal district clerk's record as referenced in the docket sheet; "E.R." refers to Leavitt's Excerpts of Record; "S.E.R." refers to the state's Excerpts of Records; "P.O.B." refers to Leavitt's opening brief.

STATEMENT OF ISSUES

Because Leavitt failed to request one, the district court has not granted a certificate of appealability ("COA") nor has this Court granted him s COA. Nevertheless, Leavitt has phrased the issues on appeal as follows:

> I. Did the district court have jurisdiction to grant Mr. Leavitt's request that the state be ordered to submit certain physical evidence to a certified independent lab for testing?
>
> II. Did the district court err in alternatively ruling that Mr. Leavitt had not made a sufficient showing to permit discovery?

(P.O.B., p.2.)

Respondent-Appellee Arvon J. Arave wishes to rephrase the issues as follows:

1. Because the district court's Order denying Leavitt's Motion for Order to Submit Evidence for Testing is not a "final order" for purposes of 28 U.S.C. § 1291, is this Court without jurisdiction to hear his appeal?
2. Because Leavitt never requested a COA from the district court and none was issued, is this Court without jurisdiction to hear his appeal?
3. Because Leavitt has failed to articulate any statute that provided the district court with authority to grant his request to order a third party to release evidence for speculative testing, did the district court have authority to grant his motion?

4. Even if it had authority to grant his motion, has Leavitt failed to establish the district court abused its discretion because he has failed to establish good cause for release of evidence held by a third party for speculative testing that would not change the outcome of his case?

STATEMENT OF THE CASE

Nature Of The Case

This capital case stems from Leavitt's appeal from the district court's Order denying his Motion to Submit, which is an interlocutory order because his Rule 60(b) Motion remains pending.[2]

Course Of Proceedings, Statement Of Facts And Disposition In State Court

Both this Court and the Idaho Supreme Court have previously detailed the facts surrounding Leavitt's brutal murder of Danette Elg. Leavitt v. Arave, 383 F.3d 809, 814-15 (9th Cir. 2004); State v. Leavitt (Leavitt I), 775 P.2d 599, 601-02 (Idaho 1989). Relevant for purposes of this appeal is the blood evidence that was admitted during Leavitt's trial establishing he was in Danette's home at the time of her murder. As detailed by this Court:

> 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.

[2] Portions of this brief were prepared before the district court issued its Memorandum Decision and Order denying Leavitt's Rule 60(b) motion on June 1, 2012. (Dkt. 347.) Because of time constraints, rather than revise this brief regarding that aspect of the case, the state advises the Court and counsel that the district court's Order denying Leavitt's Motion to Submit is no longer an interlocutory order.

> 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, 383 F.3d at 815.

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." (S.E.R., pp.161-62.) 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.

(S.E.R., p.162.) 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." (S.E.R., p.163.)

After Leavitt was sentenced to death, in a consolidated appeal, the Idaho Supreme Court affirmed his conviction and denial of post-conviction relief, but reversed his death sentence. Leavitt I, 775 P.2d at 607.

Upon remand, another sentencing hearing was held, after which Leavitt was again sentenced to death. The Idaho Supreme Court affirmed the new death sentence. State v. Leavitt (Leavitt II), 822 P.2d 523, 524 (Idaho 1991)

Course Of Proceedings, Statement Of Facts And Disposition In Federal Court

On April 29, 1993, Leavitt filed his initial Petition for Writ of Habeas Corpus (Dkt. 13), which was amended in 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" (E.R., Vol.3, p.463, ¶70.) At no time during habeas proceedings, prior to the filing of the instant motion on May 21, 2012, had Leavitt requested testing of any of the evidence that was gathered by police or introduced at trial. (Id., pp.483-508.) 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 never filed a "DNA Post-Conviction Petition" seeking testing of any of the evidence gathered by police or introduced at trial.

After concluding various claims are procedurally defaulted (E.R., Vol.III, pp.355-75), the district court dismissed Leavitt's remaining claims (S.E.R., pp.35-158). However, upon reconsideration, the district court granted Leavitt habeas relief based upon Jury Instruction 12, and ordered the state to retry Leavitt. (S.E.R., pp.10-34.)

Both parties appealed to this Court, which reversed the district court's decision regarding Jury Instruction 12, Leavitt, 383 F.3d at 816-826, and the decision that Leavitt's ineffective assistance of counsel claims stemming from his resentencing are procedurally defaulted, id. at 839-40. The district court's decision was affirmed in all other aspects, including the decision regarding trial counsels' failure to call the serology expert. Id. at 840 n.40.

On remand, the district court concluded Leavitt met his burden of establishing ineffective assistance of counsel at the resentencing and conditionally granted habeas relief (Dkt. 296), requiring the state to initiate new sentencing proceedings (Dkt. 297). This Court reversed, reasoning Leavitt failed to meet his burden of establishing deficient performance and prejudice as required under Strickland v. Washington, 466 U.S. 668 (1984). Leavitt v. Arave, 646 F.3d 605, 608-16 (9th Cir. 2011). The Supreme Court denied certiorari on May 14, 2012, Leavitt v. Arave, 2012 WL 509134 (2012), and this Court's Mandate issued on May 17, 2012. As a result, a new Death Warrant was issued on May 18, 2012, scheduling Leavitt's execution for June 12, 2012.

While Leavitt's Petition for Certiorari was pending, on March 20, 2012, the Supreme Court decided Martinez v. Ryan, --- U.S. ---, 131 S.Ct. 2960 (2011), holding "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." As a result of Martinez, Leavitt filed a Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b)

Motion") (E.R., Vol.3, pp.339-52), contending this "Court's dismissal of Claim 9 because of procedural default was incorrectly decided" (id., p.340). Since filing of his instant motion, Leavitt's execution has been scheduled for June 12, 2012. (E.R., Vol.2, pp.148-51.)

On May 17, 2012, without notice to the state, the district court approved Leavitt's request for funding "to conduct testing of certain blood samples from the crime scene." (E.R., Vol.3, p.252.) 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.253.) Counsel had difficulty contacting Andrew, but on May 21, 2012, Andrew sent counsel a letter declining to release the evidence, which 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., p.260.) 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, Leavitt filed his Motion to Submit asking the district 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." (E.R., Vol.3, pp.249-51.) While Leavitt's motion is allegedly based upon the need to "prepare the commutation or clemency petition" (Id., p254, ¶9), during oral argument on his motion, Leavitt's attorney refused to limit the results of the testing to commutation proceedings. On May 23, 2012, the district court denied Leavitt's motion, concluding it was without jurisdiction, and even if it had jurisdiction, Leavitt had failed to establish "good cause" for discovery under Rule 6 of the Rules Governing Section 2254 Cases. (E.R. Vol.1, pp.5-9.) The court likewise denied Leavitt's request for reconsideration. (Id., pp.1-4.) Leavitt filed a Notice of Appeal on May 29, 2012. (E.R., Vol.2, pp.31-33.) His Rule 60(b) motion remains pending before the district court. (Dkt. 346.)

SUMMARY OF ARGUMENT

Leavitt's motion is nothing more than a request for discovery. Because discovery orders are not final orders under 28 U.S.C. § 1291, and his Motion to Submit will not be effectively unreviewable on appeal from a final judgment, this Court is without jurisdiction to hear his appeal.

Even if this Court has jurisdiction under 28, U.S.C. § 1291, because the district court has never ruled on a request for a COA, he has failed to establish the denial of a "constitutional right," or that reasonable jurors would debate whether the district court should have resolved his Motion to Submit in a different way, this Court is without jurisdiction to hearing his case.

Leavitt has never articulated a rule or statute upon which a district judge can compel a third party to release evidence to another third party for testing. Because 18 U.S.C. § 3599 does not provide such authority the district court did not err by concluding it was without authority to grant Leavitt's Motion to Submit.

Even if the district court had authority to grant his motion, Leavitt has failed to establish good cause for granting the motion because his trial attorney has already testified Dr. Blake was not called as a witness because he agreed with most of the testing results generated by the state's expert.

Moreover, this Court has already concluded trial counsel was not ineffective by having Dr. Blake testify at trial. Leavitt's Motion to Submit is nothing more than a fishing expedition designed to delay the execution scheduled for June 12, 2012, particularly since he failed to utilize state post-conviction procedures that would have permitted DNA testing years ago.

STANDARD OF REVIEW

The standard of review of the district court's order denying Leavitt's Motion to Submit for lack of jurisdiction is reviewed *de novo*. United States v. Lockheed Missiles & Space Co., 190 F.3d 963, 968 (9th Cir. 1999). This Court reviews "a district court's decision to permit or deny discovery in habeas proceedings for an abuse of discretion." Cooper v. Brown, 510 F.3d 870, 877 (9th Cir. 2007).

ARGUMENT

I.

Because Leavitt Is Not Appealing From A Final Judgment, His Appeal Must Be Dismissed

Jurisdiction to hear a federal appeal is conveyed upon the courts of appeal pursuant to 28 U.S.C. § 1291, which states, in relevant part, "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States...." "[A]s a general rule a district court's decision is appealable under this section only when the decision 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Gulfstream Aerospace Corp. v. Maycamas Corp., 485 U.S. 271, 275 (1988). The "final order" doctrine is applicable to federal habeas cases. Blazak v. Ricketts, 971 F.2d 1408, 1410 (9th Cir. 1992).

As reaffirmed in Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 203-04 (1999) (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981)), the final judgment rule serves several purposes:

> "It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule

> is in accordance with the sensible policy of avoiding the obstruction to just claims that could come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which litigation may give rise, from its initiation to an entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration."

However, the Supreme Court has further explained:

> [W]e have interpreted the term 'final decision' in § 1291 to permit jurisdiction over appeals from a small category of orders that do not terminate the litigation. That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action.

Id. at 204 (internal quotations and citations omitted).

In Jackson v. Vasquez, 1 F.3d 885, 887 (9th Cir. 1993), this Court explained the "collateral order doctrine" as follows:

> To be appealable under the collateral order doctrine, the district court's . . . order must satisfy three criteria. First, it must conclusively determine the disputed question. Second, it must resolve an important issue that is completely separate from the merits of the action. Third, it must be effectively unreviewable on appeal from a final judgment.

Discussing the meaning of what conclusive determination of a disputed question entails, the court explained:

> An order conclusively determines a matter in dispute if it is made with the expectation that [it] will be the final word on the subject addressed. An order does not conclusively determine a disputed matter, on the other hand, if it is inherently tentative, that is, if a district court ordinarily would

> expect to reassess and revise such an order in response to events occurring in the ordinary course of litigation.

Id. (internal quotes omitted).

Because it conclusively determines the disputed question, the Order denying Leavitt's Motion to Submit meets the first prong of the collateral order doctrine. However, it fails to meet either the second or third prongs. While Leavitt's Motion to Submit is, as detailed below, nothing more than a fishing expedition, it is not completely separate from the merits of either the Motion to Submit or his commutation proceedings, but is intertwined with both.

However, even if the second prong is met, Leavitt has failed to establish denial of his Motion to Submit will be "effectively unreviewable on appeal from a final judgment," which in this case is the decision from his Rule 60(b) motion. Rather, as explained in Lewis v. Bloomsburg Mills, Inc., 608 F.2d 971, 972-73 (4th Cir. 1979), "The district court's order [denying the Motion to Submit] merely regulates the conduct of the litigation. The scope and conduct of discovery are within the sound discretion of the district court. The district court may modify its order as the litigation proceeds. Any possible harm to [Leavitt] is speculative at best."

Likewise, the Ninth Circuit has explained, "The general rules is that orders regarding discovery, including sanction orders, are normally deemed

interlocutory and reviewable only on appeal from a final judgment." In re Subpoena Served on the Cal. Pub. Utilities Comm., 813 F.2d 1473, 1476 (9th Cir. 1987). Further, "[a]ppellate review of such orders is allowed only in a limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." Id. (internal quotations and citations omitted). Review of the Order denying Leavitt's Motion to Submit is not rendered impossible by requiring that it be included in any appeal from his Rule 60(b) Motion.

Because Leavitt is not appealing from a final order and he has failed to establish this Court should review his appeal under the collateral order doctrine, this Court is without jurisdiction to hear his appeal. Therefore, it should be dismissed.

II.

Because Leavitt Failed To Request A COA And None Has Been Issued, This Court Is Without Jurisdiction To Hear His Appeal

Because Leavitt's Notice of Appeal was filed after April 24, 1996, it is governed by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Slack v. McDaniel, 529 U.S. 473, 482 (2000); Karis v. Calderon, 283 F.3d 1117, 1126 (9th Cir. 2002). As explained in Miller-El v. Cockrell, 537 U.S. 322, 335 (2003) (quoting 28 U.S.C. § 2253(c)(1)), "Before an appeal may be entertained, a prisoner who was denied habeas

relief in the district court must first seek and obtain a COA from a circuit justice or judge. This is a jurisdictional prerequisite because the COA statute mandates that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals ….'" Under 28 U.S.C. § 2253(c)(2), "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

Federal Rule of Appellate Procedure 22(b) also governs an appeal from the denial of a habeas petition arising from a detention by a state court, and states, in relevant part:

> In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue.

Moreover, Circuit Rule 22-1(a) requires a motion for a COA to "first be considered by the district court." Additionally, "[t]he court of appeals will not act on a motion for a COA if the district court has not ruled first."

In Leavitt's case, the district court did not act on a motion because he failed to request a COA. Even if this Court were to consider Leavitt's

Notice of Appeal as a request for a COA or otherwise consider whether a COA is warranted, such a request would have to be denied because he has failed to meet the requisite requirements. First, a COA will issue "only if the applicant has made a substantial showing of the denial of a **constitutional right**." 28 U.S.C. § 2253(c)(2) (emphasis added). As explained in Campbell v. Blodgett, 982 F.2d 1356, 1358 (9th Cir. 1993), "there simply is no federal right, constitutional or otherwise, to discovery in habeas proceedings as a general matter." Therefore, because Leavitt had no constitutional right to the discovery requested in his Motion to Submit, he cannot meet the threshold requirement of "a substantial showing of the denial of a constitutional right."

Moreover, Leavitt cannot meet the standards for issuance of a COA that have been explained by the federal courts. In Slack, 529 U.S. at 483-84, the Supreme Court discussed the standard Leavitt must meet before this Court may grant a COA:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further."

When a habeas petition is dismissed on procedural grounds, the petitioner must also meet the following test before this Court may grant a COA regarding those claims:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id. 529 U.S. at 484. As further explained by the Supreme Court:

> Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.

Id. at 485.

In examining whether a COA should issue, § 2253 "requires an overview of the claims in the habeas petition and a general assessment of their merits." Miller-El, 537 U.S. at 336. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." Id. The COA standard does not mandate that Leavitt "show

that he should prevail on the merits." Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)); *see also* Miller-El, 537 U.S. at 337. Additionally, "even though a question may be well-settled in a particular circuit, the petitioner meets the modest [COA] standard where another circuit has reached a conflicting view." Lambright, 220 F.3d at 1025-26. Likewise, "[t]he court must resolve doubts about the propriety of a COA in the petitioner's favor." Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot, 463 U.S. at 893).

However, merely because the required showing is not onerous does not mean a COA must always be granted. Miller-El, 537 U.S. at 337. Rather, the COA is designed to serve as "a gatekeeping mechanism that prevents [the court] from devoting judicial resources on frivolous issues while at the same time affording habeas petitioners an opportunity to persuade us through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit." Lambright, 220 F.3d at 1025; Miller-El, 537 U.S. at 337-38 ("A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part") (quoting Barefoot, 463 U.S. at 893). "Statutes such as AEDPA have placed more, rather than fewer, restrictions

on the power of federal courts to grant writs of habeas corpus to state prisoners." Miller-El, 537 U.S. at 337.

As detailed below, not only has Leavitt failed to establish the district court even had jurisdiction to grant his motion, but he failed to establish good cause as required for the granting of discovery in habeas cases. Therefore, he cannot meet the standards for issuance of a COA.

III.

Leavitt Has Failed To Establish The District Court Had Authority To Grant His Motion

Leavitt correctly notes the district court relied, at least in part, upon Baze v. Parker, 632 F.3d 338 (6th Cir. 2011), in concluding it was without jurisdiction to grant his motion. While Leavitt attempts to distinguish Baze, he not only ignores the fundamental legal principles, but fails to provide this Court any authority that would permit the district court to grant his motion.

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….

In Baze, 632 F.3d at 342, the court 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." 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. The court further explained that Harbison does not 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 interference 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.

Leavitt contends Baze is distinguishable since "the federal habeas litigation was final, with nothing pending in the federal court at the time the motion was made," while his habeas case remains pending before the federal court because of his Rule 60(b) Motion. (P.O.B., pp.8-9.) Not only is this a distinction without a difference, it is contrary to Jackson v. Vasquez, 1 F.3d 885, 888-89 (9th Cir. 1993), where this Court examined 21 U.S.C. § 848(q)(9), which was the precursor to 18 U.S.C. § 3599, but was repealed in 2006. Relying upon 21 U.S.C. 848(q)(9), Jackson filed an ex parte motion requesting an order to compel the Warden to transport him for a brain scan. Jackson, 1 F.3d at 886. At the time, § 848(q)(9) read as follows:

> Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the

> representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore. . . .

Rejecting Jackson's contention that § 848(q) "empowers the district court to compel the Warden to transport [him], at state expense, for medical tests," this Court explained, "Section 848(q) is a funding statute. It provides for the appointment of attorneys and the furnishing of investigative services for defendants or habeas corpus petitioners seeking to vacate or set aside a death sentence." Jackson, 1 F.3d at 888. While § 848 "permits district courts to disburse funds on an ex parte showing that the funds are reasonably necessary for adequate representation," it does not "authorize[] the district court to issue, upon a petitioner's ex parte request, a coercive order against a state official." Id. As this Court explained, "The statute directs the [district] court to authorize the *defendant's attorneys* to obtain investigative, expert or other services on behalf of the defendant; it does not empower the district court to compel action from a state official." Id. (emphasis in original).

Clearly, the issue is not the finality of a habeas case, but simply whether the relevant statute grants authority to a district judge to compel a third party to act. Because no such authority exists, the district court did not error by concluding it was without authority to grant Leavitt's motion.

IV.

Leavitt Has Failed To Establish The District Court Abused Its Discretion By Denying His Motion

Assuming that if it had authority to grant Leavitt's motion, the district court also denied his motion pursuant to Rule 6 of the Rules Governing Section 2254 Cases because he failed to establish good cause. (E.R., Vol.1, p.9.) The court explained, "Petitioner has not linked the potential discovery that he seeks to any habeas claim or issue currently before the Court. His counsel's vague suggestion at oral argument that DNA test results might support a claim of ineffective assistance of trial counsel . . . is unavailing." (Id.) The court further concluded it was "tardy and speculative in light of the established evidentiary record before the Court." (Id.)

"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 evidence collected at the murder scene, but also evidence **admitted** at trial, he has demonstrated "no cause," merely assuming he is entitled to test items that in fact may have already been tested by Dr. Blake. Leavitt merely contended the items should be released "for forensic testing" (E.R., Vol.1, p.249), but failed to articulate what kind of testing would be completed, how long it would take, whether the items would be consumed as a result of the testing, or any other information regarding the scope or type of "forensic testing" being requested. Moreover, Leavitt 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.

Further, Leavitt's request for testing is particularly tenuous considering his trial attorney conceded Dr. Blake's review of the forensic evidence was "completely consistent with that of Ann Bradley." (S.E.R., p.162.) In light of counsel's concession that Dr. Blake was not called as a witness because "it would emphasize the strongest part of the State's case" (id.) and this Court's conclusion that failing to call Dr. Blake as a witness

was not ineffective, Leavitt, 383 F.3d at 840 n.40, it is difficult to fathom how additional testing is anything but a "fishing expedition."

In Dist. Attorney's Office v. Osborne, 557 U.S. 52, 62 (2009), the Supreme Court recognized the significance DNA testing can provide, but also 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 his Motion to Submit was filed, 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 this Court'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.

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, he has failed to establish the district court abused its discretion by denying his Motion to Submit.

CONCLUSION

Leavitt has failed to establish any basis for this Court to reverse the district court or for this case to be remanded. The state requests that this Court dismiss Leavitt's appeal or, alternatively, affirm the Order of the district court.

Dated this 2nd day of June, 2012.

/s/
L. LaMont Anderson
Deputy Attorney General
Chief, Capital Litigation Unit

STATEMENT OF RELATED CASES

To the best of the state's knowledge, there are no related cases pending in this court.

Dated this 2nd day of June, 2012.

/s/
L. LaMont Anderson
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF COMPLIANCE

I certify that:

3. Briefs in Capital Cases

__X__ This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4

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/s/
L. LaMont Anderson
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on or about the 2nd day of June, 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:

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