NO. 12-35427

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD A. LEAVITT, Petitioner-Appellant, vs. A.J. ARAVE, Respondent-Appellee.	)	DISTRICT COURT NO. CV-93-24-BLW DISTRICT OF IDAHO BOISE

REPLY BRIEF OF THE APPELLANT

On appeal from the United States District Court for the District of Idaho the Honorable B. Lynn Winmill, United States District Judge, presiding.

David Z. Nevin
NEVIN, BENJAMIN, McKAY
& BARTLETT LLP
P.O. Box 2772
Boise, ID 83701
208-343-1000

Andrew Parnes
671 N. 1st Avenue
Ketchum, ID 83340
208-726-1010

Attorneys for Appellant

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Respondent acknowledges in footnote 2 that the order at issue in this appeal "is no longer an interlocutory order," (Resp. Brief, p. 4, n. 2) but fails to advise this Court that on June 1, 2012, the district court issued a Certificate of Appealability as well. (See, Dkt, 348.) Therefore, this Reply Brief will not address Arguments I and II of Respondent's Brief which are now moot. This Court has jurisdiction and a Certificate of Appealabilty was issued.

PROCEDURAL HISTORY

The State makes much ado about the request coming late in the proceedings and on the "eve of the execution" (Rep. Brief. p. 31), but the record establishes the half-truth of this constant refrain.

At the time Mr. Leavitt first contacted the State Prosecuting Attorney about possible release of the evidence in mid-April 2012, Mr. Leavitt's Petition for Certiorari was still pending, the State's Brief in Opposition having been filed on April 11, 2012, after it had received an extension of time from the Supreme Court. (*See*, United States Supreme Court Dkt. No. 11-8844.) At that time, counsel for Mr. Leavitt reviewed the evidence with the Prosecuting Attorney to see if there were any missing items of evidence.[1] At that meeting, counsel first learned that

[1]All of the evidence was in the custody of the Blackfoot Police Department, including all prosecution exhibits which had been admitted at trial. To the extent that the State claims there might be some difference between evidence merely

the prosecution in 2001 sent some evidence, including trial exhibits, to the Idaho State Police (ISP) Laboratory and an out of state lab, later identified as the King County, State of Washington Sheriff's Department Laboratory, in anticipation of Mr. Leavitt's re-trial which had been ordered by Judge Winmill.

Results of the King County testing were voluntarily forwarded to Mr. Leavitt's counsel on or about April 27, 2012. The lab notes from the ISP lab were provided by the State's attorney on May 23, 2012, after the hearing on Mr. Leavitt's motion to have the evidence submitted for testing.

On May 11, 2012, *before* the decision of the Supreme Court denying certiorari in this case, Mr. Leavitt filed his Rule 60(b) motion. At the time the motion was filed, the State had not sought a death warrant. More strikingly, the State had not sought a warrant since November 1992, after the Supreme Court denied Mr. Leavitt's petition for certiorari challenging his resentencing which had been upheld by the Idaho Supreme Court. *State v. Leavitt*, 822 P.2d 523 (1992). The last death warrant issued in this case was on February 5, 1992, setting an execution for February 28, 1992. That execution was stayed by Justice O'Connor

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collected at the crime scene and exhibits admitted in evidence at trial, that distinction cannot apply here where the state district court released the trial exhibits back to the prosecution. (Resp. Brief, p. 28.) There is apparently no dispute that the items sought are in the possession of the Blackfoot Police Department.

and by its own terms expired on the denial of certiorari on November 9, 2012.[2] Because no new warrant was sought by the State, Mr. Leavitt had nothing to stay when he filed his Petition for Writ of Habeas Corpus in 1993.

Having been served the Rule 60(b) motion by Mr. Leavitt on May 11, 2012, the State's Deputy Attorney General nevertheless chose to immediately seek a death warrant in an unreported, ex-parte, in-chambers meeting with a state district court judge the morning after this Court issued its mandate.[3] Mr. Leavitt's counsel had previously filed a notice demanding an opportunity to be heard at that hearing. As the State conceded at oral argument on the Rule 60(b) motion, the relevant Idaho statute authorizes the State to seek a warrant but sets no time constraint within which the State may take that action. *See*, I.C. § 19-2715. However, once the State applies for a warrant, the state court must set an execution date within 30 days, if "no legal reason exists against the execution of the judgment ... ." I.C. §§ 19-2715(4).

Thus, the State itself has created the rush to execution in this case and cannot now use that excuse for urging denial of Mr. Leavitt's otherwise timely

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[2]The State's attorney, at the oral argument on the Rule 60(b) motion, stated he had no idea why no warrant had been sought over the past twenty years.

[3]The mandate from this Court issued at 4:09 p.m. MDT on May 16, 2012 and the death warrant was issued at 11:28 a.m. MDT, on May 17, 2012.

requests to the district court. It is true that Mr. Leavitt's motion to submit evidence for testing was filed a few days after the issuance of the warrant, but the request to the prosecuting attorney was made the very day the district court approved funding for the testing.

As demonstrated in the motion, Mr. Leavitt brought the motion only after the prosecuting attorney refused to release the evidence and indicated that decision was solely up to the Blackfoot Police Department. Upon the filing of this motion, the State's position became one of opposition rather than cooperation. Had the evidence been released when initially requested the testing would have been completed by the June 1 hearing on the Rule 60(b) motion, and before the Idaho Commission on Pardons and Parole considered Mr. Leavitt's commutation petition, which has not yet occurred.

THE DISTRICT COURT HAD JURISDICTION TO ORDER RELEASE OF THE EVIDENCE

The State's attempt to argue that the district court lack authority to issue the requested relief can be rejected swiftly. The State contends that *Jackson v. Vasquez*, 1 F.3d 885 (9th Cir 1993) is identical to *Baze v. Parker*, 632 F.3d 338 (6th Cir. 2011), and deprives the federal courts of jurisdiction in this case. But, *Jackson* does no such thing. This Court did hold that the federal funding statute

does not grant the district court authority to issue an ex parte order requiring the state prison to transport an inmate for a medical examination. At the time of his motion, Jackson had no habeas corpus petition on file in the district court, but had received several stays in order to prepare a habeas petition. Thus, *Jackson* was similarly situated to *Baze* and *Beaty*. In contrast, Mr. Leavitt had a properly filed petition pending in federal court.

Indeed, this Court in *Jackson* limited its holding to the facts before it – an ex parte request before a habeas petition was filed.

> We need not decide whether, upon proper notice and motion at a proper stage in the habeas corpus proceedings, the district court is empowered to issue an order requiring a state official to transport a prisoner for medical examinations that are necessary to the petitioner's case. *See Fed. R. Civ. P. 35*; *Rule 6, Rules Governing § 2254 cases*, 28 U.S.C. Foll. § 2254 (1977). We simply conclude that the ex parte fund disbursement procedures of *section 848(q)* do not support the district court's transportation order against the Warden.

Jackson, 1 F.3d at 889

Of course, Mr Leavitt did provide notice to the State at a time when the district court had the authority to grant the requested relief as *Jackson* noted. The district court here erred in concluding it lacked jurisdiction to issue the requested relief.

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE REQUEST

Because the district court erroneously believed it was without jurisdiction to grant the motion, the question of the exercise of its discretion under Rule 6 of the Rule Governing Section 2254 Cases was discussed only in one paragraph of the order denying relief. (Dkt. 335, ER V1, p. 009.)

The district court denied the motion because "Petitioner has not linked the potential discovery that he seeks to any habeas claim or issue currently before the Court," (*id.*) The court then dismissed Mr. Leavitt's argument that the testing related to the matters pending before the Court in the previously filed Rule 60(b) motion as "unavailing. The request is also tardy and speculative in light of the established record before the Court." (*Id.*)

The State now contends that Mr. Leavitt was engaged in a "fishing" expedition despite the narrowly drawn request for the mere release of five items of evidence. In this, the State relies on a number of cases from this Court none of which deal with a specific release of particular items of evidence for the purpose of forensic testing, and related to a claim then pending before the district court.

In *Rich v. Calderon*, 187 F.3d 1064 (9th Cir. 1999), this Court examined a broad range of discovery requests. The district court had referred the discovery

issues to a Magistrate Judge.

> Rich contends he was denied the opportunity to discover and present evidence supporting his claims. In fact, the Magistrate Judge established an entirely reasonable process to deal with the claims for which Rich sought discovery and a hearing. The process required Rich to identify which of his claims remained unexhausted, which actually presented federal questions, and those as to which habeas relief might be available if favorable evidence were developed. Despite being given more than five months to investigate and prepare as well as a full day of argument to identify claims that might colorably entitle him to relief, Rich was unable to do so.

Rich, 187 F.3d at 1067.

In *Campbell v. Blodgett*, 982 F.2d 1356 (9th Cir 1993), Petitioner filed a motion to permit videotaping of the pending execution by hanging of another defendant to support a possible Eighth Amendment claim in Petitioner's case. Over dissent, the majority held that there was no abuse of discretion in this unusual request made under F.R. Civ. P. 27(b) regarding the perpetuation of evidence while the underlying case is pending appeal. No similar request was made in this case.

In *Calderon v. United States District Court, ex rel Nicholaus*, 98 F.3d 1102 (9th Cir. 1996), this Court examined the propriety of a district court's grant of discovery *before* a habeas petition, an issue not before this Court. Most critically, Mr. Leavitt was not on a fishing expedition, unless re-examination of a critical

piece of evidence used against him at trial and related to a pending Rule 60(b) motion, as well as to clemency proceedings, can be considered a "fishing" expedition. If the State's argument is accepted, habeas petitioners would have absolutely no ability to re-test specific pieces of evidence relied upon to convict them in state court. On the contrary, such requests are routinely granted during the course of habeas proceedings.

In fact, this Court in considering a second and successive petition request in a capital case where there was a claim of actual innocence noted that the district court might resolve the issue rapidly by ordering testing. "As soon as Cooper's application is filed, *it should promptly order that these two tests be performed* in order to evaluate Cooper's claim of innocence." *Cooper v. Woodford*, 358 F.3d 1117, 1124 (9th Cir.) (en banc), *cert. denied, Goughnour v. Cooper*, 541 U.S. 1057 (2004) (emphasis added).

Mr. Leavitt's case is not in the procedural posture of a second petition, but his Rule 60(b) was pending before the district court and the requested retesting was relevant to prove his innocence of the crime. As here, there was other evidence to prove Cooper's guilt at trial. "Salient among that evidence was a spot of blood taken from a hallway in the Ryen house, the bloody t-shirt, and a hand-rolled cigarette found in the Ryens' abandoned car in Long Beach. Pursuant

to an agreement between Cooper and the State, all three of these pieces of evidence have been subjected to DNA testing. All three tests resulted in a positive match with Cooper's DNA. Despite this DNA evidence, Cooper continues to maintain his innocence." *Id.* at 1123.

In *Thomas v. Goldsmith*, 979 F. 2d 746, (9th Cir. 1992), this Court addressed a similar "conundrum" for a habeas petitioner. There petitioner alleged actual innocence as excuse for a procedural default, but the petitioner did not have access to the semen sample at issue. This Court remanded with directions to have the State disclose the evidence.

> We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding. Thomas has alleged that the state possesses evidence which would demonstrate his innocence and revive an otherwise defaulted ground for issuing a writ. Under the circumstances, fairness requires that on remand the state come forward with any exculpatory evidence it possesses. If no such evidence exists, the state need only advise the district court of that fact.

Id. at 749-50.

Here, the State has the evidence identified by Mr. Leavitt; they simply refuse to release that evidence for independent testing. This Court should order release of that evidence for testing to permit the district court on remand to consider the significance of the results of the forensic testing.

Nor are the State's citations to cases from other circuits controlling here. In each of those cases, the petitioner was seeking a broad right to review the prosecution's file for the possibility of the existence of materials which might support the claim. *See*, *Deputy v. Taylor*, 19 F.3d 1485 (3rd Cir. 1994); *Munoz v. Keane*, 777 F.Supp 282 (S.D.N.Y. 1991) (both cases involving complete search of prosecution files for possible evidence of racial discrimination in jury selection under *Batson*); and *Green v. Artuz* 990 F.Supp 267 (S.D.N.Y. 1998) (broad request for officer's notes not supported).

The district court abused its discretion in this capital case by not ordering the State to release the evidence when requested. Nor was the request "tardy," as it was made in relation to pending matters before the district court both as to the Rule 60(b) and the commutation proceedings. Nor was the request speculative, as it sought testing on a few items of evidence related to the testing of the blood found on those items.

The State's reliance on *District Attorney's Office v. Osborne*, 557 U.S. 52 (2009), is not controlling in a properly filed and pending habeas petition. Osborne filed a 42 U.S.C. § 1983 to order the local prosecutor to release evidence for DNA testing. The Supreme Court held that he had no constitutional due process right to obtain the testing; the court did not address Osborne's ability to obtain the

evidence for testing in a properly filed habeas case. The holding in *Osborne* cannot be read to deny all habeas petitioners access to evidence for testing when relevant to issues before the habeas court, as the State here urges.

Nor is the law in Idaho as broadly applied as that in Alaska. In Idaho, Mr. Leavitt's access to the state court ended on July 1, 202 pursuant to I.C. § 19-4902. In Alaska, neither the statutory scheme nor the case law contain the Idaho constraints imposed on access to testing. *Osborne*, 557 U.S. at 64-65.

Finally, the State argues that discovery should be denied because Mr. Leavitt did not provide the State with full information about the reliability of the laboratory who would examine the evidence.[4] The district court did not reach this argument. This "concern" for the reliability of the laboratory can be readily resolved by the district court upon remand for the testing should this Court not accept that the laboratory is fully credentialed, certified, and used by law enforcement agencies. Quarreling about these issues was a ruse, nothing more than a means of further delaying Mr. Leavitt's access to the evidence and the opportunity to prove his innocence.

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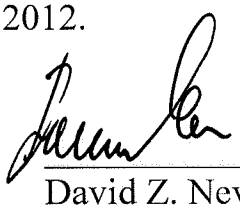
[4]Because of the shortened time frame created by the State's attorney seeking a death warrant, Mr. Leavitt was not permitted to file a reply to the State's objection and presented oral statements at the hearing concerning the credentials of Sorenson Forensics in Salt Lake City.

This Court should assure that Mr. Leavitt has one fair and full consideration of his habeas petition. The State has failed to assert a valid reason for its opposition to testing of the evidence other than its purported desire to execute Mr. Leavitt on June 12, 2012, a date set unilaterally and arbitrarily by the State itself. Had the local prosecutor permitted the testing, as he originally indicated he would, the results would have been available to the Court by now, and this Court would have the complete facts upon which to determine if Mr. Leavitt is entitled to relief or not.

CONCLUSION

For the reasons stated herein and in his opening brief, Mr. Leavitt respectfully requests that this Court remand the matter to the district court with directions to order the release of the evidence and further consideration of the Rule 60(b) upon completion of that testing. Mr. Leavitt has further requested a stay of his execution in his appeal pending in related case No. 12-35450.

DATED this 3rd day of June, 2012.

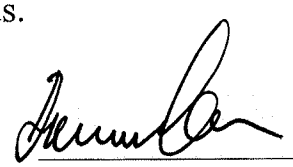


David Z. Nevin
Andrew Parnes

CERTIFICATION PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Ninth Circuit Rule 32-1 and Fed. R. App. P. 32(a)(7)(c), I certify that the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 2985 words.

Dated: June 3, 2012.

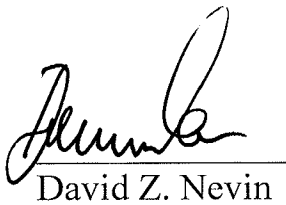


David Z. Nevin

STATEMENT OF RELATED CASE PURSUANT TO CIRCUIT RULE 28-2.6

Pursuant to Ninth Circuit Rule 28-2.6, the case of Leavitt v. Arave, No. 12-35450 is a related case as it arose out of the same case in the district court.

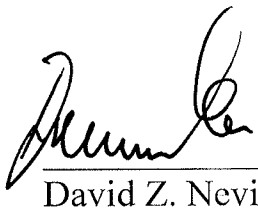
Dated: June 3, 2012.



David Z. Nevin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 3rd day of June, 2012, I caused a true and correct copy of the foregoing reply brief to be served on LaMont Anderson, Deputy Attorney General, State of Idaho, by electronic court filing.



David Z. Nevin