

1     **IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO**

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4	RICHARD LEAVITT,	: Case No. 1:93-cv-24-BLW
5	Petitioner,	: <b>MOTION HEARING</b>
6	vs.	:
7	A.J. ARAVE,	:
8	Respondent.	:
9	----- x	:

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14     **REPORTER'S TRANSCRIPT OF PROCEEDINGS**

15

before B. Lynn Winmill, Chief District Judge

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18     May 22, 2012

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I N D E X

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## P R O C E E D I N G S

May 22, 2012

THE CLERK: The court will now hear Civil Case 93-24-S-BLW, Richard Leavitt versus A.J. Arave, regarding a motion for order to submit evidence for testing.

THE COURT: Good afternoon. Counsel, I understand we have Mr. Parnes on the phone, as well?

MR. PARNES: That's correct, Your Honor. I can hear you.

THE COURT: All right. Counsel, I have reviewed the briefs that have been submitted on this matter. Just to lay the background, the court did authorize some additional testing in this matter, and I think there were ex parte proceedings, as normally we handle those types of requests. Then the issue arose concerning, apparently, an understanding by counsel that the State, through I think it was probably the Blackfoot Police Department, were going to release certain evidence for testing, DNA testing. Apparently, that was either a misunderstanding or there was a change of heart on the part of the Bingham County prosecutor. But in any event,

clemency or commutation proceeding, but I guess the prisoner, the convicted, the person facing the death penalty -- how do you get that far? What statutory basis is there?

And how do you take the Supreme Court's decision and somehow ride that horse to a point where you can say that there is an entitlement to compel third parties to cooperate without doing some pretty severe justice to some ideas of the limited jurisdiction of the federal courts and federalism concerns and trying to avoid conflict between state and federal jurisdictions?

So those are my primary concerns. I may have others.

Another one, notably, would be a concern that this may be a -- and I'm not suggesting anything nefarious on your part at all, simply doing your job -- that this may be a somewhat thinly veiled effort to come up with additional grounds that would justify the imposition of a stay, totally apart from the commutation and clemency proceedings.

So, with that, Mr. Nevin, have at it.

MR. NEVIN: Thank you, Your Honor.

With the court's permission, I might

there was a refusal to make that available and, hence, the motion here to compel that.

Mr. Nevin, I'm going to hear you first. I assume you'll be arguing, although if Mr. Parnes wants -- if the agreement was Mr. Parnes will argue, that would be fine as well.

My real concern is how -- I just don't see how I have jurisdiction here right out of the chute. Certainly the Supreme Court has indicated that, from Section 3599 that there is an entitlement to federally appointed counsel to assist in clemency and commutation proceedings. I don't think anyone disputes that. And I think a logical extension of that would be perhaps to include an entitlement to the kinds of things that counsel in a commutation and clemency hearing might feel necessary to adequately represent their client, which might include testing or experts to conduct evaluations of the defendant to support those proceedings.

But I think the next step is: How does that also then extend to the court reaching out to third parties and compelling them to provide or cooperate with the petitioner or -- actually, I'm not sure what you call a person who is pursuing a

ask Mr. Parnes to address an issue from time to time, particularly if I don't get it all, if that's all right with the court.

THE COURT: That's fine.

MR. NEVIN: I know the court's normal rule, but we're kind of scrambling, haven't had a lot of time to respond to Mr. Anderson's memorandum.

You know, I think we -- I understand the court's concern about the idea of delay, and I think we articulated in our moving papers that were ex parte, the idea that we are dealing with a commutation situation, and we do, for obvious reasons, not want to leave any stone unturned.

Now, when we got into this issue, we learned that the State had actually sent materials out for testing, as well, back in 2001 and had never provided us with the results of that.

THE COURT: Did you know the testing had been requested?

MR. NEVIN: No, sir. And so -- and let me be clear, because I think some confusion arose with the affidavit that I filed yesterday.

There apparently have been two sets of testing. And one involved materials that were sent to an examiner in King County, Washington, in

1 the Seattle area in Washington, to do fingerprint  
2 testing. But there is another group, another  
3 round of testing or separate group of exhibits  
4 apparently that were sent to the state lab in  
5 Meridian here in Idaho.

6 And we have received -- we misspoke in  
7 my original affidavit -- we have received the  
8 results of the fingerprint testing from King  
9 County. We have not received any results yet from  
10 the -- from the testing that was done in 2001.

11 THE COURT: But that was fingerprint  
12 testing; correct? Or was this DNA testing?

13 MR. NEVIN: In King County.

14 THE COURT: What happened in the state  
15 forensics lab here?

16 MR. NEVIN: Don't know. But the impression  
17 we had -- and what we know about it is contained  
18 in the letter that Mr. Andrew sent to Mr. Parnes  
19 -- I think to Mr. Parnes, copied to me. And it  
20 left me with the impression that there was some  
21 kind of serological testing going on, some kind of  
22 blood testing. And one would have to assume that  
23 it would be DNA being done in 2001, but I don't  
24 know that.

25 And I guess the point is -- you know, I

1 saying, under your Rule 60 motion, that if in fact  
2 there has been some quasi Brady violation or  
3 something akin to that, that the court would have  
4 jurisdiction and should compel, what? Because I'm  
5 not sure that leads to Bingham County being  
6 required to produce the underlying data or the  
7 underlying evidence that could be subjected to  
8 testing, but it might relate to perhaps an order  
9 compelling the State in kind of, again, an  
10 appropriate Brady approach, to turn over whatever  
11 it is they have.

12 MR. NEVIN: Well, right. And in the  
13 fullness of time, that might well be an  
14 appropriate way to proceed. Judge Shindurling has  
15 taken the position that he doesn't have  
16 jurisdiction to do anything except issue the death  
17 warrant. In fact, he initially declined to rule  
18 on our -- we filed a notice of a desire to be  
19 heard in front of him on the question of whether  
20 the death warrant should issue, and he declined to  
21 permit us to do that and held that he -- ruled  
22 that he didn't have jurisdiction to do anything  
23 except issue the death warrant.

24 We filed a motion to reconsider that  
25 and pointed to some matters, and Judge Shindurling

1 make the point because there is -- you know, the  
2 suggestion is that, you know, obviously, the State  
3 was waiting -- was going back over this material,  
4 as well, and wanting to test it. Because the case  
5 arose in 1984. There were the issues of type A  
6 and type O blood that Mr. Anderson referred to in  
7 his memorandum, and I think everybody wants to get  
8 that sorted out.

9 And so that's -- that's what we're  
10 pursuing here, and it clearly is an issue with  
11 respect to -- with respect to clemency, and, of  
12 course, that's, I think, why the court made the  
13 decision to provide the resources for us.

14 But I think it could also be  
15 potentially an issue on our 60(b) motion in front  
16 of this court that there could have been issues  
17 that the court -- that counsel could have explored  
18 but didn't and that that might bear on the  
19 ineffective assistance of counsel claim. I  
20 recognize we're talking about doing testing now  
21 that could not have been done in 1984, but I think  
22 that there may be -- that there could be a  
23 connection to other issues that may have been  
24 available to counsel back at the time.

25 THE COURT: Let's play that out. So you're

1 initially sent that to the Supreme Court. And I  
2 think he has since -- maybe earlier this morning  
3 -- has since actually ruled on that. But it  
4 appears to me, at least at this point, that we  
5 don't have a forum in state court with which --  
6 under which to advance these issues.

7 I mean, the obvious thing that occurred  
8 to counsel and to me was to file a motion -- a  
9 motion to compel a discovery response. The court  
10 will recall the court issued -- conditionally  
11 issued a writ in 2000, if I'm not mistaken. And  
12 at that point, a trial was set in Bingham County.  
13 And counsel was appointed for Mr. Leavitt in  
14 Bingham County and filed a request for discovery,  
15 so there was a request for discovery pending.

16 And just speaking totally inferentially  
17 now as opposed to based on personal knowledge, it  
18 seems to me and to Mr. Parnes that, likely, the  
19 State at that time anticipated going forward with  
20 a trial and had this testing done. But counsel --  
21 the lawyer, Jim Archibald, who was appointed for  
22 Mr. Leavitt in state court, says that he has not  
23 received the results of any of that testing, and  
24 we haven't either.

25 So it seems to us that the State has

1 not complied with its discovery obligations.

2 Indeed, we didn't --

3 THE COURT: In this proceeding?

4 MR. NEVIN: Well --

5 THE COURT: In the habeas proceeding?

6 MR. NEVIN: Well, certainly in the state  
7 court proceeding, where we no longer have any  
8 jurisdiction, apparently -- I'm sorry -- where we  
9 no longer have a forum in which to raise this  
10 issue.

11 THE COURT: So you're saying Judge  
12 Shindurling, you think this morning, did issue a  
13 decision on the merits of some kind?

14 MR. NEVIN: Could I ask Mr. Parnes to speak  
15 to this?

16 THE COURT: Yes. Mr. Parnes.

17 MR. PARNES: Yes. I think it was actually  
18 yesterday, but he -- we did a motion to  
19 reconsider, and he ruled that he had no  
20 jurisdiction to consider a motion to reconsider  
21 our request to appear because all he had to do was  
22 to sign the warrant.

23 THE COURT: Well, let me -- Mr. Parnes, just  
24 so I understand, what was his initial decision?

25 MR. PARNES: The initial decision --

1 a clemency or commutation petition -- any forum in  
2 which one can seek that discovery, either by way  
3 of statute spelling it out or perhaps the inherent  
4 kind of mandamus power of the Idaho Supreme Court  
5 that might be employed?

6 The suggestion that there is no forum  
7 raises two questions. One is: You know, why does  
8 it have to be Bingham County? It's really now  
9 before the parole commission. And the question  
10 is: Would some kind of mandamus proceeding be in  
11 order to compel them to support or allow this type  
12 of discovery? And then second, I don't know that  
13 the federal courts have any obligation or right to  
14 dictate a particular proceeding in a state  
15 clemency or commutation process. So it's kind of  
16 a dual question.

17 Aren't there some remedies out there  
18 that you might pursue? And secondly, even if  
19 so -- even if there are none, what jurisdiction do  
20 I have to direct an agency of the state government  
21 that they have to provide a particular process,  
22 including discovery?

23 MR. NEVIN: And I'll ask Mr. Parnes to  
24 interrupt me if I leave something out, but I  
25 believe that Mr. Parnes pursued this with research

1 THE COURT: That you asked him to  
2 reconsider.

3 MR. PARNES: The initial decision was -- we  
4 requested and filed on May 15th a notice -- a  
5 motion to be noticed of when the death warrant  
6 would issue, and there would be a hearing so that  
7 we could appear. And on the 17th, he denied that  
8 and then shortly thereafter issued the death  
9 warrant, within an hour.

10 THE COURT: So is there a request pending  
11 before him for discovery in support of the  
12 commutation?

13 MR. PARNES: No.

14 THE COURT: Okay. Now, let me ask --  
15 Mr. Nevin, you can weigh in on this or ask  
16 Mr. Parnes if he has any further information. Is  
17 there available to -- I'm assuming commutation and  
18 clemency proceedings are directed at either the  
19 parole commission and/or the governor's office.

20 MR. NEVIN: I think it's the former,  
21 Your Honor.

22 THE COURT: Parole commission?

23 MR. NEVIN: Correct.

24 THE COURT: All right. Now, that being the  
25 case, is there a basis for -- again, in support of

1 this morning, and what we determined is that the  
2 parole commission doesn't have subpoena power or  
3 the power to order third parties to take  
4 particular actions.

5 And do I have that right?

6 MR. PARNES: Under -- looking at the IDAPA  
7 rules, I did not see anything that would authorize  
8 a subpoena power.

9 MR. NEVIN: So, I mean -- and I  
10 understand -- I guess the answer would have to be  
11 at this point incomplete on the first part of your  
12 question, Your Honor.

13 The second part, you know, we read --  
14 because you arrive at this anomalous situation,  
15 the court issues an order in -- I mean supporting  
16 counsel and taking particular actions that the  
17 court concludes is -- are appropriate or at least  
18 supportable under Harbison. And then the state  
19 court's something -- state officials, let's say, I  
20 think would be the way to put it -- state  
21 officials thwart that, and it ends up in the -- so  
22 that, yes, there is money made available for you  
23 to pursue a particular remedy, but the State has  
24 decided they don't want to cooperate with that  
25 and, therefore -- well, or I guess I might say the

1 Blackfoot Police Department has decided that it  
2 doesn't want to cooperate with that, and so you  
3 don't get to do it.

4 THE COURT: Doesn't Harbison -- all it says  
5 is that you have an entitlement to an attorney who  
6 can help you through whatever tangled process the  
7 State may have created for this; or, if there is  
8 no process, then to do whatever you can do.

9 But I'm still concerned that that  
10 becomes quite a big jump to go from the right to  
11 counsel to the right to discovery and the right to  
12 compulsory process, the right to subpoena, all of  
13 those additional rights that seem to be quite a  
14 step beyond just the right to have an attorney.

15 MR. NEVIN: And I guess our sense is this:  
16 We have read the Osborne case, of course, that's  
17 cited in counsel's moving papers. I just want to  
18 point out that's a noncapital case, and noncapital  
19 defendants don't have a right to commutation. But  
20 Ohio vs. Woodard says that minimal due process  
21 does apply in the case of capital defendants to  
22 clemency proceedings.

23 And Mr. Anderson cited Baze vs. Parker,  
24 and I think you -- and I understand that in Baze  
25 vs. Parker, the court concluded -- and I believe

1 court would have jurisdiction to make its  
2 orders -- referring to the order under Harbison --  
3 to make its orders meaningful by making limited  
4 directions to state officials to take particular  
5 kinds of action.

6 And it seems to us that this is exactly  
7 that kind of a situation. The prosecuting  
8 attorney in his letter to Mr. Parnes says that we  
9 don't -- I don't have an interest in this either  
10 way, in essence. It's up to the Blackfoot Police  
11 Department.

12 The Blackfoot Police Department, we  
13 spoke to the -- to the chief on the phone. A  
14 cordial guy, not particularly hostile,  
15 necessarily, but he just says, "Get me a court  
16 order, and I'll do it. I'll send it off." It's  
17 not a big thing. It's just that it's not --  
18 according to him, at least, he can't do it without  
19 a court order.

20 So the feeling -- the feeling -- and I  
21 might ask Mr. Parnes if I state this incorrectly.  
22 Mr. Parnes went and looked at this evidence in  
23 April and had a conversation with Mr. Andrew at  
24 the time, and the court said -- as the court said,  
25 it's either a misunderstanding -- my sense of what

1 it's the Sixth Circuit, if I'm not mistaken --  
2 concluded that they didn't -- that the court  
3 didn't have jurisdiction to order -- to make an  
4 order of this type. But they were dealing in a  
5 specific situation that involved an order to force  
6 prison guards to interview with defense counsel.  
7 And we're talking about something very different  
8 here. We're talking about the simple physical act  
9 of forwarding articles of evidence.

10 And Mr. Anderson raised a number of  
11 concerns about the practical considerations of  
12 that, and I can -- I came prepared to satisfy some  
13 of those, I think.

14 But this is, in any event, an action  
15 that occurs every day, everywhere. And I don't --  
16 I don't know -- I have never heard of a court  
17 ordering, for example, a prison guard to sit down  
18 and talk to defense counsel if the prison guard  
19 doesn't want to. I mean, I think that's  
20 extraordinary relief under any circumstances.

21 I would direct the court's attention to  
22 the concurrence in Baze. And I was -- I just had  
23 it up on my screen in which the third vote for --  
24 to take that course was one which reserved the  
25 proposition that in another type of case, the

1 Mr. Parnes is saying is that they had -- that  
2 Mr. Andrew said, you know, "Just let me know, and  
3 we'll get it done." And that's, obviously,  
4 hearsay on my part.

5 Mr. Parnes, can you address that?

6 MR. PARNES: Well, yes. I mean, I had  
7 a -- what could only be described as a casual and  
8 lengthy conversation with Mr. Andrew about a  
9 number of matters after we looked at the evidence.  
10 I believe that was on April 16th. And --

11 THE COURT: You mean September?

12 MR. PARNES: No. April.

13 THE COURT: I mean -- not -- May 16th?

14 MR. PARNES: No, no, no. April.

15 THE COURT: This is April?

16 MR. PARNES: I looked -- this April 16th, I  
17 went out to Blackfoot to look at that to see if we  
18 were anticipating needing to do anything. And as  
19 a result of that, after that, in discussing with  
20 Mr. Nevin, is when we filed the motion for seeking  
21 funds to do that.

22 And my understanding at that time was  
23 it would not be a big issue. I don't -- I'm  
24 not -- I don't mean that that in any way should  
25 bind him at this point, and I don't -- and he is

1 certainly free to change his mind, and he has.  
 2 So -- but that was my understanding at the time.  
 3 MR. NEVIN: Yeah. And I wanted to mention  
 4 that, Your Honor, only for this reason, because  
 5 there is this -- as the court said, the  
 6 implication of just trying to delay this. But we  
 7 understood back in April that it wouldn't be a  
 8 problem, and I think we would have started this  
 9 process sooner. And so I -- I may have attributed  
 10 intentions to Mr. Andrew that went in my affidavit  
 11 yesterday that I didn't really have, but we  
 12 started calling him -- that he really didn't have  
 13 -- but we started calling him last week, didn't  
 14 get return calls.

15 And in -- you know, we were pretty  
 16 frustrated by this because we felt that there was  
 17 at least an understanding that there wouldn't be a  
 18 problem with having this tested so long as we  
 19 could afford to have it done. And once the court  
 20 issued its order approving that, we then put that  
 21 process into motion and were told that there  
 22 was -- that something different was prevailing.

23 And I'm just looking at Judge Cole's  
 24 concurrence in the Baze case, and he makes the  
 25 point that the majority is parsing the language

1 contact with the defendant.

2 And Judge Cole is saying: Yeah, in  
 3 that situation, Harbison would be rendered  
 4 meaningless. The federal courts would be deprived  
 5 of jurisdiction to have their orders have meaning  
 6 if you could simply say, "Well, fine. You have  
 7 appointed a lawyer, and you have provided funding,  
 8 but you can't meet with the defendant." I mean,  
 9 there would be other problems. But I think what  
 10 Judge Cole is saying is, under those  
 11 circumstances, 3599(f) would give the court  
 12 jurisdiction to enter an order.

13 And our situation is not that. We  
 14 haven't been denied access to Mr. Leavitt, but  
 15 it's analogous to it in the sense that it doesn't  
 16 require state actors to do -- to take any -- to do  
 17 actions of the sort that would be involved with  
 18 conducting a discussion with defense counsel.  
 19 It's just simply a matter of putting evidence in a  
 20 FedEx envelope, which we'll pay for and provide,  
 21 and sending it off to a fully accredited lab which  
 22 does work for a number of governmental agencies  
 23 around the country. I have their -- I have their  
 24 materials here and can demonstrate that.

25 So that's -- I mean, I think the

1 out of 3599(f) and conflating "authorize" and  
 2 "permit" to have the same meaning. And he  
 3 acknowledges that 3599(f) doesn't ensure -- and  
 4 I'm quoting now -- "the 'total success' of an  
 5 investigator or 'establish a substantive right for  
 6 that person to acquire that information over all  
 7 possible obstacles.' Yet, nothing in 3599(f)  
 8 prohibits a federal court from finding, in  
 9 circumstances such as the examples described  
 10 above, that state action frustrated the 'services'  
 11 a federal court authorized counsel to obtain. I  
 12 believe we would have jurisdiction under 3599(f)  
 13 to address that issue when it arises and to remedy  
 14 any such interference."

15 And the example that he gives is state  
 16 action that prevented an appointed attorney from  
 17 meeting with the defendant or otherwise consulting  
 18 with the defendant about services the court found  
 19 to be reasonably necessary.

20 So it would be, in other words, one  
 21 thing to say the court is not going to order  
 22 prison guards to meet with defense lawyers. It  
 23 would be another thing for the court to say -- a  
 24 situation to arise where defense attorneys were  
 25 provided funding under Harbison but were refused

1 argument is that Baze really doesn't foreclose the  
 2 court from issuing -- excuse me -- from issuing an  
 3 order of this sort.

4 THE COURT: All right. Getting back to the  
 5 Rule 60 motion and that, the request is being  
 6 made, though, solely based upon kind of a natural  
 7 extension of the rights in Harbison, not in  
 8 support of a Rule 60 motion in the habeas  
 9 proceeding. Am I correct about that?

10 MR. NEVIN: Your Honor, I'm not sure that I  
 11 am fully prepared to speak to that.

12 THE COURT: All right.

13 MR. NEVIN: Because Mr. Parnes and I spoke  
 14 about this briefly as we were throwing these  
 15 materials together yesterday. I would not want to  
 16 concede that there could not be relevance to the  
 17 60(b) motion in this --

18 THE COURT: Well, part of the problem, of  
 19 course, would be -- you know, I assume that  
 20 somewhere in this, there is probably an  
 21 ineffective assistance of counsel claim under the  
 22 Rule 60(b) motion. And when you look, obviously,  
 23 at a Strickland test, you have to look at both  
 24 defective performance or deficient performance and  
 25 prejudice.



1 And in this case, of course,  
2 Mr. Leavitt conceded at trial that the blood --  
3 his blood was there at the scene. So it's a  
4 little hard for me to see what, if any, difference  
5 it would make if it turns out that there can be  
6 reliable DNA testing showing that the blood was or  
7 was not from Mr. Leavitt, perhaps either in the  
8 clemency and commutation proceeding or in support  
9 of the Rule 60(b) motion.

10 MR. NEVIN: But, Your Honor, that -- I mean,  
11 if the blood there is not --

12 THE COURT: -- is not Mr. Leavitt's.

13 MR. NEVIN: -- is not Mr. Leavitt's, then  
14 that would be a huge matter. And -- I mean, and  
15 that's exactly the issue.

16 It's almost an anachronistic -- maybe  
17 that's the wrong word -- but it gives you the  
18 feeling like you're looking at an old -- at an  
19 old, you know, copy of "Life" magazine or  
20 something. And if you go back in time, they were  
21 talking about blood typing and secretors and  
22 markers and so on, and they couldn't -- they  
23 weren't able to precisely pin it to Mr. Leavitt.

24 THE COURT: Well, they were able to say that  
25 he fell within one percent of the population that

1 and that's what went up, apparently, to King  
2 County and was -- but what I'm inquiring about now  
3 is this question of what you knew about -- I'm  
4 going to ask Mr. Anderson to explain here in a  
5 moment, but if there was serological testing of  
6 the blood samples by a state lab, and when did you  
7 learn that. And I'm understanding that's very,  
8 very recent.

9 MR. PARNES: I'm just -- Your Honor, just to  
10 be clear, when you're -- I mean, obviously, in  
11 1985, at trial, there was serological testing done  
12 by the lab. The testing that was done in 2001 in  
13 anticipation of the -- of the case coming back for  
14 retrial, that we just learned of --

15 THE COURT: Right.

16 MR. PARNES: -- and the results of that  
17 yesterday.

18 THE COURT: Okay.

19 MR. PARNES: There was some indication that  
20 some items were in mid-April of this -- some items  
21 were retested, and I wasn't sure exactly where  
22 that was.

23 THE COURT: All right.

24 MR. PARNES: Either at the King County lab  
25 or in Meridian, but I didn't know that for sure.

1 had the same blood type and markers as was found  
2 on the blood type -- the blood sample found at the  
3 crime scene.

4 MR. NEVIN: But we didn't have the kind  
5 of --

6 THE COURT: Right.

7 MR. NEVIN: -- what would be standard today.  
8 There was much more that was -- had to be inferred  
9 back in the day.

10 THE COURT: Just so it's clear, you did --  
11 when did you learn that there was blood typing or  
12 serological testing of some kind done by the  
13 Meridian lab? Was that something you just came up  
14 with in the last few weeks, or was it --

15 MR. NEVIN: No. That's something that came  
16 up within the last few hours. We learned that  
17 when Mr. Andrew sent a letter to us yesterday at  
18 12 --

19 Mr. Parnes, wasn't it 12:07?

20 MR. PARNES: Yes. And just so it's clear,  
21 Mr. Andrew mentioned to me that they had sent  
22 evidence out. At the time, I believed that it was  
23 the evidence that was sent out looking for the  
24 fingerprints in the blood.

25 THE COURT: No. I understood all of that,

1 I was provided the King County material on  
2 April 27th.

3 THE COURT: All right. That's fine.

4 All right. Anything else? Let me hear  
5 from Mr. Anderson unless there is something else  
6 you want to add.

7 Mr. Anderson, could you start us off by  
8 just telling me what you know about the testing  
9 and the -- not in a real generic sense. I'm  
10 talking only very specifically about the -- any  
11 serological testing done in the last 15 years that  
12 perhaps has not been disclosed to the petitioner.

13 MR. ANDERSON: Your Honor may recall that in  
14 2001, of course, this court granted habeas relief  
15 based upon the jury instruction and remanded for  
16 retrial. It was sometime in 2001 that Mr. Andrew,  
17 the Bingham County prosecutor, then sent some  
18 materials to the state lab for further testing,  
19 serological testing, including DNA.

20 I think if the court were to take a  
21 look at Docket No. 330-5, which is Exhibit D to  
22 Mr. Nevin's affidavit, it's a May 21st, yesterday,  
23 letter from Mr. Andrew discussing specifically --  
24 well, maybe not specifically but discussing what  
25 happened at that time. And apparently there were

1 some items that were tested for semen; however, as  
2 I understand Mr. Andrew's letter and in my  
3 discussions with Mr. Andrew in the last few days,  
4 DNA testing could not be completed apparently  
5 because of fecal matter associated with the  
6 various exhibits.

7 And so, in any event, it's my  
8 understanding, in talking to Mr. Andrew and from  
9 his letter, that DNA testing was not completed in  
10 2001. And it may very well be that further  
11 testing was -- was ended after this court entered  
12 its stay in 2001 requiring the State to retry  
13 Mr. Leavitt based upon the State's appeal.

14 I just don't know entirely why it was  
15 completed -- or not finished or not done. I do  
16 know that --

17 THE COURT: But you're representing that, to  
18 your knowledge, the testing was never -- it was  
19 attempted but not completed because it was  
20 determined that there was some corruption of the  
21 sample so that they could not be successfully  
22 completed? I just want to make sure we're  
23 accurate as --

24 MR. ANDERSON: And I appreciate that,  
25 Your Honor. What I can tell you is that in

1 that degradation of the DNA was the reason why the  
2 items were not tested for DNA at the time.

3 So I may have misspoke.

4 Apparently, he doesn't know why there  
5 wasn't DNA testing at that time.

6 THE COURT: But there is a report indicating  
7 that there was some degradation of the samples?

8 MR. ANDERSON: I can't go that far based  
9 upon what I know, Your Honor. I just know that  
10 Mr. Andrew said that there can be degradation  
11 based upon fecal matter, and I think that he  
12 assumes that that's what happened, but I can't  
13 represent that to the court.

14 THE COURT: I think you told me all I need  
15 to know. Thank you.

16 MR. ANDERSON: Okay.

17 I do want to address the question that  
18 the court had regarding a possible remedy in state  
19 court. I would agree with Mr. Nevin that there  
20 isn't one now, but there was in 2001, when the  
21 Idaho legislature enacted 19-4902 or amended  
22 19-4902 which allowed for DNA testing. At that  
23 time it was a new statute.

24 But nothing was done by -- by counsel  
25 in filing a successive petition, which would have

1 Mr. Scott's letter, he states that he talked  
2 to --

3 THE COURT: Mr. Andrew's letter? Scott  
4 Andrew; right?

5 MR. ANDERSON: Mr. Andrew's letter, the  
6 prosecutor's letter. He indicated he had talked  
7 to a Ms. Nowlin at the state lab, and I'm assuming  
8 that that was yesterday.

9 And the notes in the file indicate --  
10 and I'll quote -- "In 2001, Ms. Bradley analyzed  
11 the items for the presence of semen. None was  
12 detected. She also states that she did not see  
13 anything in the file regarding any DNA testing  
14 being done on the items."

15 THE COURT: Excuse me. On the items?

16 MR. ANDERSON: On the items that were sent  
17 to the state lab.

18 And the items, as recalled by the  
19 prosecutor, included a comforter, a pillowcase, a  
20 shirt, a pair of panties, and some brown shirts.

21 Ms. Nowlin confirmed that bacteria from  
22 fecal matter can degrade the DNA, which can  
23 complicate or eliminate the ability to obtain  
24 testable DNA. But Mr. Andrew -- excuse me -- the  
25 prosecutor does go on and state he is not sure

1 been permitted in that unique circumstance for the  
2 testing or for DNA testing at that time. In fact,  
3 there has been no request for forensic testing in  
4 federal habeas even though there was a claim of  
5 ineffective assistance of counsel raised regarding  
6 trial counsel's failure to do some testing in the  
7 amended petition many, many, many years ago. And  
8 it's only now that we're on the eve of this  
9 execution that we're being requested to turn this  
10 information over.

11 You mentioned, Your Honor, mandamus. I  
12 don't believe that the Idaho Supreme Court would  
13 consider that because the UPCPA is the sole remedy  
14 for these type of things. And that wasn't done  
15 back when that statute was passed, and the statute  
16 of limitations for DNA testing under that statute  
17 has now expired.

18 I would submit that this court does not  
19 have authority under the federal statute pursuant  
20 to Harbison and to Baze. And as far as the  
21 possibility that any results from the testing  
22 could be used to support the current ineffective  
23 assistance of counsel claims in the current final  
24 petition, we would submit that we would have some  
25 serious problems under Gonzalez as far as

1 presenting new evidence, new facts that would,  
2 from the State's position, absolutely result in  
3 that being considered a successive petition.

4 And, of course, we're going to address  
5 the 60(b) motion in our response to that motion,  
6 which will be filed tomorrow sometime.

7 Unless the court has questions --

8 THE COURT: No. That's fine. Thank you.

9 MR. ANDERSON: Thank you, Your Honor.

10 THE COURT: Mr. Nevin, any response?

11 MR. NEVIN: Well, Your Honor, it -- it seems  
12 to me that -- I just want to address the issue of  
13 the provision for a successive petition. It could  
14 have been filed in 2001. And I -- I have to say I  
15 wasn't able, in the time before our hearing, to  
16 familiarize myself with the record -- with the  
17 state of the record at the time -- it may well be  
18 that this -- that the thought was to address this  
19 in the proceedings that were anticipated and in  
20 which Mr. Archibald was appointed and a trial date  
21 was actually set in Bingham County court after the  
22 court's decision in, I believe, 2000.

23 But, in any event, the question of  
24 whether there is -- would have been a right at  
25 another time under state law to do this is a

1 whatever testing was done by the lab has now at  
2 least been set forth by Mr. Anderson; and, in  
3 fact, no testing was done. It was apparently sent  
4 in anticipation of the retrial; and either because  
5 the samples were degraded or because the court  
6 issued a stay of the retrial, it just never  
7 happened.

8 Now, if -- if there is something about  
9 that, Mr. Anderson, I would assume, just as a  
10 matter of wanting to ensure that you have not  
11 misled the court and counsel, you will correct  
12 that if you, upon further inquiry, determine that  
13 in fact something you said here was not accurate.  
14 I know you would never intentionally mislead the  
15 court or counsel; but if -- as you proceed in the  
16 matter, if it appears that something needs to be  
17 said to correct the record, then I assume you'll  
18 do so.

19 Mr. Nevin, was there something you  
20 wanted to add?

21 MR. NEVIN: Well, yes. Thank you, Your  
22 Honor. I just wanted to make sure the court  
23 understood that -- and counsel will correct me if  
24 I'm wrong about this -- but I think counsel has  
25 only looked at the letter -- the same letter the

1 separate question from whether or not these  
2 materials are relevant to either the 60(b) motion  
3 or to a clemency proceeding. And irrespective of  
4 whether it would be a successive petition or not,  
5 these matters that we seek to inquire into here  
6 are relevant to the question -- to those two  
7 questions.

8 So it doesn't seem to me that the --  
9 that the existence of that remedy, which was not  
10 pursued, should control the way the court rules on  
11 this issue. And I take it counsel -- I think -- I  
12 didn't hear additional argument, really, on the  
13 question of the court's jurisdiction, so I think  
14 we have -- I think we have covered what we had to  
15 say on that subject.

16 Thank you, Your Honor.

17 THE COURT: All right. Counsel, we've --  
18 we'll issue a written decision. It should be out  
19 maybe -- I don't know if it will be out by 5:00,  
20 but it will be out tomorrow for sure.

21 We quickly looked at the issue, and so  
22 I have got some of my thoughts, but I want to kind  
23 of refine my thinking based upon the arguments we  
24 have heard here. I think at least one thing that  
25 was resolved was at least the uncertainty about

1 court has looked at and that I've looked at. And  
2 it says that Mr. Andrew spoke to Ms. Nowlin, and  
3 Ms. Nowlin -- I don't know what her relationship  
4 to the testing or to the results were. And I  
5 think one of the things that we are entitled to is  
6 to see the reports. And my experience is that  
7 frequently people see different things in  
8 reports --

9 THE COURT: All right.

10 MR. NEVIN: -- depending on what -- where  
11 they sit in the process.

12 But, anyway, I think there is -- it's  
13 double hearsay to us, the report, and I --

14 THE COURT: Well, if I were ruler of the  
15 world, I would certainly require that everything  
16 be turned over to the defense. I don't see why  
17 anyone would find an interest in proceeding with  
18 an execution if, indeed, there is some truly  
19 exculpatory evidence out there that needs to be  
20 disclosed.

21 But the Brady obligation of the  
22 prosecutor, of course, is only to turn over that  
23 which is, in fact, exculpatory or potentially  
24 exculpatory. And I'm assuming that if  
25 Mr. Anderson, upon inquiry, determines that, in

1 fact, there was test results, then I assume he  
2 would, even at this late date, assume that he had  
3 a Brady obligation to turn that over to you and  
4 Mr. Parnes.

5 But if it is his understanding that no  
6 testing was actually performed, the mere fact that  
7 it was submitted for testing would not seem to be  
8 relevant under the most liberal reading of Brady  
9 and not subject to any disclosure obligation.

10 So --

11 MR. NEVIN: Right. And I don't -- I mean,  
12 maybe I have misspoken about what Mr. Anderson  
13 knows, but I wouldn't say that the obligation to  
14 provide us the information is completely  
15 contained -- is cabined by Brady. I mean, in  
16 other words, yeah, there is a discovery request  
17 pending. And even if it weren't exculpatory in  
18 the sense of providing an absolute defense of some  
19 kind, it might well be something that would be  
20 relevant on -- I mean, I just don't know what it  
21 has. But in my experience, when you go over these  
22 things carefully, when you look at things that are  
23 provided to you, you sometimes find inferences or  
24 things that are helpful in them. And when we  
25 don't have them -- I was just -- I got up only

1 confident Mr. Anderson will turn it over if -- in  
2 terms of discovery obligations and the context of  
3 a case that is in the posture of this case with,  
4 you know, the -- you know, I made my ruling. The  
5 circuit disagreed with me on both the retrial and  
6 the resentencing. At this point, we have a Rule  
7 60(b) motion, and I suspect that the circuit would  
8 perceive that the State, the respondent in this  
9 proceeding, has a pretty limited obligation to  
10 engage in any further disclosure of materials  
11 pursuant to discovery requests given the posture  
12 of the case.

13 And I'm just not going to go there at  
14 this point. I would hope Mr. Anderson would feel,  
15 as an attorney, that he would, indeed, want to  
16 ensure that justice was done if there is something  
17 out there. But at this point, I have to assume,  
18 as he has represented to the court, that he knows  
19 of nothing; that all he knows is what's disclosed  
20 in the letter, which indicates that the materials  
21 were submitted for testing but no testing was  
22 actually completed. That's as far as I can go.

23 All right. Counsel, we'll issue a  
24 written decision, have it out tomorrow, I'm sure.  
25 I appreciate, again, counsel's -- you know, I'm

1 because the court said -- used the term that it  
2 thought that this matter had been cleared up or  
3 something to that effect, and it doesn't feel  
4 cleared up to me.

5 THE COURT: I understand. And I -- and I  
6 don't want to -- I mean, I'm not suggesting  
7 necessarily that the obligations that Mr. Anderson  
8 has is cabined by Brady, but we are in a position  
9 now where the only thing pending before the court  
10 is a Rule 60(b) motion. And whatever -- well, you  
11 know, I would hope that if, in fact, there is any  
12 test results that have been completed, regardless  
13 of what the results may be, whether they are  
14 exculpatory or not, I mean, it just seems like it  
15 would be prudent to turn those over to avoid  
16 unpleasantness down the road if it turns out that  
17 there was something of consequence that was not  
18 turned over in response to the State's discovery  
19 obligations -- not Brady but discovery  
20 obligations.

21 MR. NEVIN: Yes, sir.

22 THE COURT: But I can't -- you know, to me,  
23 it's a -- I'm guessing. I mean, I have no clue  
24 what is out there. All I can say with certainty  
25 is if there is Brady material, I am absolutely

1 always amazed at the quality of the briefing,  
2 particularly on short notice. I don't want to  
3 diminish the quality of the work, but I'm assuming  
4 Mr. Anderson maybe approached the same issue, or  
5 perhaps he came up with an awfully good long,  
6 thoughtful brief on very short notice. I'm  
7 wondering if he's had that issue with perhaps  
8 Mr. Rhoades or somewhere else. If not, I am even  
9 in more -- have even greater respect because I  
10 thought it was a very well-done brief on very  
11 short notice.

12 In any event, we'll issue a written  
13 decision in due course and be in recess.

14 (Proceedings concluded at 4:18 p.m.)  
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R E P O R T E R ' S C E R T I F I C A T E

I, Tamara I. Hohenleitner, Official Court Reporter, State of Idaho, do hereby certify:

That I am the reporter who transcribed the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause.

IN WITNESS WHEREOF, I have hereunto set my hand June 4, 2012.

-s-  
Tamara I. Hohenleitner  
Official Court Reporter  
CSR No. 619

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