IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

RICHARD LEAVITT,	:	Case No. 1:93-cv-24-BLW
Petitioner,	:	**MOTION HEARING**
vs.	:	
A.J. ARAVE,	:	
Respondent.	:	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

before B. Lynn Winmill, Chief District Judge

May 22, 2012

Pages 1 to 39

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I N D E X

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,

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

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

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

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

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

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

MR. NEVIN: In King County.

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

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

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

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

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

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

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

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

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

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

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

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

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

So it seems to us that the State has

not complied with its discovery obligations. Indeed, we didn't --

THE COURT: In this proceeding?

MR. NEVIN: Well --

THE COURT: In the habeas proceeding?

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

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

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

THE COURT: Yes. Mr. Parnes.

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

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

MR. PARNES: The initial decision --

THE COURT: That you asked him to reconsider.

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

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

MR. PARNES: No.

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

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

THE COURT: Parole commission?

MR. NEVIN: Correct.

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

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

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

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

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

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

And do I have that right?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Parnes, can you address that?

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

THE COURT: You mean September?

MR. PARNES: No. April.

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

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

THE COURT: This is April?

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

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

certainly free to change his mind, and he has. So -- but that was my understanding at the time.

MR. NEVIN: Yeah. And I wanted to mention that, Your Honor, only for this reason, because there is this -- as the court said, the implication of just trying to delay this. But we understood back in April that it wouldn't be a problem, and I think we would have started this process sooner. And so I -- I may have attributed intentions to Mr. Andrew that went in my affidavit yesterday that I didn't really have, but we started calling him -- that he really didn't have -- but we started calling him last week, didn't get return calls.

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

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

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

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

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

contact with the defendant.

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

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

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

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

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

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

THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

THE COURT: Right.

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

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

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

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

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

THE COURT: No. I understood all of that,

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

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

THE COURT: Right.

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

THE COURT: Okay.

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

THE COURT: All right.

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

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

THE COURT: All right. That's fine.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Excuse me. On the items?

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

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

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

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

So I may have misspoke.

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

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

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

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

MR. ANDERSON: Okay.

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

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

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

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

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

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

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

Unless the court has questions --

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

MR. ANDERSON: Thank you, Your Honor.

THE COURT: Mr. Nevin, any response?

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

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

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

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

Thank you, Your Honor.

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

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

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

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

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

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

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

THE COURT: All right.

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

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

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

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

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

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

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

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

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

MR. NEVIN: Yes, sir.

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

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

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

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

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

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

(Proceedings concluded at 4:18 p.m.)

REPORTER'S CERTIFICATE

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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