

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		:
6	Petitioner,	: MOTION HEARING
7		:
8	vs.	:
9		:
10	A.J. ARAVE,	:
11		:
12		:
13	Respondent.	:
14	----- 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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